

CONSUMER INFORMATION IN NEW ZEALAND:  
THE REGULATION OF ADVERTISING AND DISCLOSURE  
OF INFORMATION RELATING TO GOODS, SERVICES  
AND ASSOCIATED CREDIT.

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ABSTRACT

A competitive marketplace for goods, services and associated credit is in no small measure dependent upon the existence of adequately informed consumers. Consumers who are ignorant of the full nature, quantity and price of items sold, or credit available, in the market cannot make a rational purchasing decision. Chapter I endeavours to place the topic of consumer information in socio-economic perspective, considers the necessity for government intervention in the marketplace and outlines basic objectives of consumer protection legislation.

Chapter II is devoted to business self regulation with emphasis being placed upon the codes of advertising practice. While it is recognised that self regulatory schemes exhibit considerable potential to advance the consumer interest, self regulatory codes of conduct and practice suffer through incomplete subscription to such codes and through inadequate sanctions for enforcement. This dictates that self regulation alone is not enough and that legislative intervention and control is essential.

The consumer is accorded a comprehensive and diverse bundle of rights by statute and at common law and Chapter III examines the nature and extent of the consumer's remedies as against an advertiser, seller, etc. Given the dependence of substantive rights on procedural rights, it is argued that the real measure of benefit conferred lies in the ease of implementation of these rights, or otherwise. Consideration is given to small claims tribunals as important low cost forums for the settlement of disputes and to class and representative actions.

Chapter IV discusses statutory control of advertising in New Zealand and liberal reference is made to the regulation of advertising in the United States where considerable development has occurred in the fields of corrective advertising and advertisement substantiation. It is suggested that New Zealand could benefit by the promulgation of rules designed to achieve these ends. Furthermore, it is pointed out that control over the *genus* of unfair advertising is at best partial and it is suggested that the legislature take appropriate steps to remedy deficiencies in this area.

The disclosure of information outside the advertising arena is examined in Chapter V and, in particular, attention is focused on the mandatory disclosure regime introduced by the Credit Contracts Act 1981 and on packaging and labelling laws. The valiant

efforts of organisations such as the Consumers' Institute who disseminate much useful information relating to goods, services and credit, is discussed.

In conclusion it is argued that various measures be implemented to improve the quantity and quality of information available in the New Zealand market and to this end it is proposed that a new Consumer Information Act be enacted. It is also submitted that this legislation, and other consumer protection legislation, be administered under the umbrella of a Consumer Affairs Department.

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## I. INTRODUCTION

'On some not distant day, the voice of each individual seller may well be lost in the collective roar of all together. Like injunctions to virtue and warnings of socialism, advertising will beat helplessly on ears that have been conditioned by previous assault to utter immunity ... . It will be worth no ones while to speak, for since all speak none can hear.'

John K. Galbraith, The Affluent Society (1958), 202.

### (1) GENERAL

Before a decision to purchase or hire a product or service is made a consumer usually consults, or is exposed to, several sources of information ranging from advertising to point-of-sale disclosure by the seller. In this dissertation the nature of the controls, statutory and otherwise, over the quantity, quality and nature of this information fall to be assessed. The scope of the enquiry is confined to consumer transactions in respect of goods and services,<sup>1</sup> although illustrations may be drawn from outside this frame of reference. However, as the extension of credit is so often connected inextricably with the disposition of goods and services, it is proposed to extend the ambit of this enquiry to embrace information pertaining to the availability and nature of credit.

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(1) As to the definition of "goods" and "services", see: the Sale of Goods Act 1908, s 2(1); the Merchandise Marks Act 1954, s 2(1); the Consumer Information Act 1969, s 2(1); the Hire Purchase Act 1971, s 2(1); the Credit Contracts Act 1981, s 2(1).

A definition of the term 'consumer' for all purposes is difficult to give. In the narrow sense a consumer may be viewed as a person who acquires goods or services for private use or consumption; that is, for non-business purposes.<sup>2</sup> However, many of the problems encountered by small companies, unincorporated traders and farmers when dealing with large business enterprises are very similar to those faced by the consumer who acquires goods for private use, and the solutions and protections afforded to the latter group may be allocated appropriately to the former.<sup>3</sup> Consequently for purposes of this dissertation the term 'consumer' refers to any person, natural or legal, to whom goods, services or credit are supplied or sought to be supplied by another in the course of a business carried on by him.<sup>4</sup>

As subsequent chapters will reveal, there are a myriad of laws and voluntary constraints regulating the provision of information in its various guises. Numerous statutes and regulations have as their principal or incidental object the control of advertising, packaging and labelling, and the mandatory disclosure of information relating to

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(2) See, for example, the Final Report of the Committee on Consumer Protection (Cmd. 1781, 1962) para 2. The "Molony" Committee describe a 'consumer' as 'one who purchases (or hire-purchases) goods for private use or consumption'.

(3) Refer to: Cranston, Consumers and the Law (1978), 8; Aaker and Day, Consumerism (2 ed, 1974), xvii; Taperell, Vermeesch and Harland, Trade Practices and Consumer Protection (1974), 174.

(4) Obviously the context may dictate that a more limited interpretation must be placed on the term, as where the legislature has restricted the ambit of the protective mechanisms of certain statutes to those persons it has perceived to be in greatest need of protection or assistance. See, for example, the Credit Contracts Act 1981, s 15(1)(d); the Hire Purchase Act 1971, ss 12(1)(c), 22(4); the Door to Door Sales Act 1967, s 2(1).



goods or services. While this is a fact of modern life, the justification for such extensive regulation is less clear. Therefore it is proposed in this Introduction to consider briefly some fundamental issues in an endeavour to place the topic of 'consumer information' in a proper economic and social context.

## (2) GOVERNMENT INTERVENTION vs. MARKET REGULATION

A fundamental question is: should legislation be enacted for the protection of the consumer and for the mandatory disclosure of information or should the market and the common law be preferred over state regulation?

'Laissez-faire' was the rallying cry of philosophers and businessmen in the nineteenth century and both groups were against bureaucratic restrictions on freedom of opinion and enterprise. As Dalton<sup>5</sup> comments

'Belief in laissez-faire was like belief in pre-marital chastity, a conviction about what ought to be, rather than actual knowledge of who actually does what to whom in the real world. The economists supplied the underlying rationale for governmental chastity, for continence in its market interventions and spending.'

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- (5) Economic Systems and Society (1974), 44. See also Keynes, The End of Laissez-Faire (1926), 13-14, where he comments: "The economists were teaching that wealth, commerce and machinery were the children of free competition - that free competition had built Man... . The principle of the Survival of the Fittest could be regarded as a vast generalisation of the Ricardian economics. Socialist interferences became, in the light of this grander synthesis, not merely inexpedient, but impious, as calculated to retard the onward movement of the mighty process by which we ourselves had risen like Aphrodite out of the primeval slime of Ocean".

Laissez-faire found its economic expression in free enterprise and the superiority of the market over public regulation or control as an instrument of economic co-ordination. Today the leading advocates of the laissez-faire approach are the Chicago school of economists and their disciples in various other parts of the world. Fundamental to this treatment of the consumer and his position in the economy generally, is the assertion that the consumer is sovereign. According to this theory the consumer's role is to guide the economy to the production of goods and services that he wants - the consumer, in short, expresses his wishes by casting 'dollar votes'.<sup>6</sup> The aggregate of 'votes' cast dictate what the economy should produce, how production can be efficiently organised and how the resulting output should be distributed. Viewed in this way the consumer is sovereign because, for example, if consumers are dissatisfied with the quality of a particular commodity they will collectively cease to purchase that commodity. Finding that the commodity is no longer commercially saleable at that price the producer may be forced to improve the product quality, lower the price or abandon production altogether.

Furthermore, competition among businesses is said to minimise the risk of undesirable trade practices. This point may be elaborated upon by reference to advertising.

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(6) Samuelson, Economics (8 ed. 1970), 40.

Free market theorists argue that legislative interference to combat the joint problems of misleading and uninformative advertising is unnecessary and potentially harmful. It is argued that where there is a plurality of sellers of goods and services that have unequal attributes, for example, the sellers of superior goods and services will accurately inform consumers, through advertising, of the attributes of their products and will challenge and expose any misleading or inaccurate claims by competitors; that is, competitive forces generate accurate information about goods and services and the seller of the superior product or service has an incentive to fully inform the consumer. Businesses which resort to deception to encourage sales will soon lose patronage to their competitors when disillusioned consumers find, or are advised, that the product or service does not measure up to advertised expectations. Consequently such businesses will have to modify their behaviour or run the risk of the ultimate market sanction - liquidation.<sup>7</sup> Proponents of the laissez-faire approach therefore see consumer protection legislation as unnecessary, given consumer sovereignty in the market place.

However there are certain debatable assumptions underlying the analysis upon which the edifice of consumer sovereignty is erected. There has to exist a situation of

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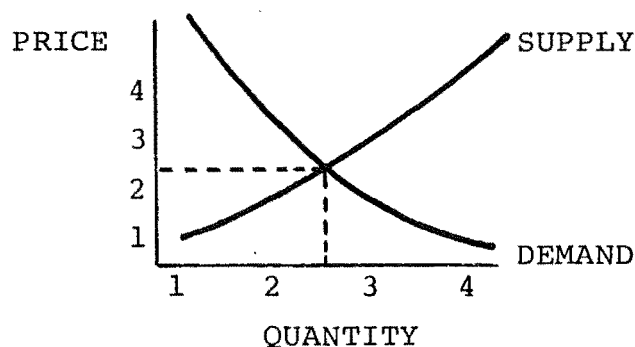
(7) See, for example, Posner, 'Strict Liability: A Comment', (1973) 2 The Journal of Legal Studies 205, 211; Samuelson, *op.cit.*, chapter 3; Cranston, *Consumers and the Law* (1978), 20; Cranston, 'Creeping Economics', [1977] British Journal of Law and Society 103, 104, Dickey and Ward, 'Consumer Legislation in Socio-Economic Perspective: Observations from the Enactments of One State', (1978) 13 University of Western Australia Law Review 378, 397.

perfect competition which entails, *inter alia*:

- (i) The presence of large numbers of independently acting buyers and sellers operating in the market for any particular product, resource or service.

This emphasises the fact that the essence of competition is the widespread diffusion of economic power among the individual units, that is, the manufacturers, sellers and consumers, which comprise the economy. In particular where a large number of buyers and sellers are present in a particular market, no one buyer or seller will be able to demand or offer a quantity of the product sufficiently large to noticeably influence the price.<sup>8</sup> For example, if a

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- (8) Samuelson, Economics (8 ed 1970), 61-63 explains how supply and demand determine market price and quantity. Demand is a schedule reflecting the willingness of buyers to purchase a given product during a specific time period at each of the various prices at which it might be sold. Supply is a schedule showing the amounts of a product which producers would be willing to offer in the market during a given time period at each possible price at which the commodity might be sold. Under competition, the interaction of market demand and market supply will adjust to the point at which quantity demanded and the quantity supplied are equal. This is the equilibrium price and quantity.

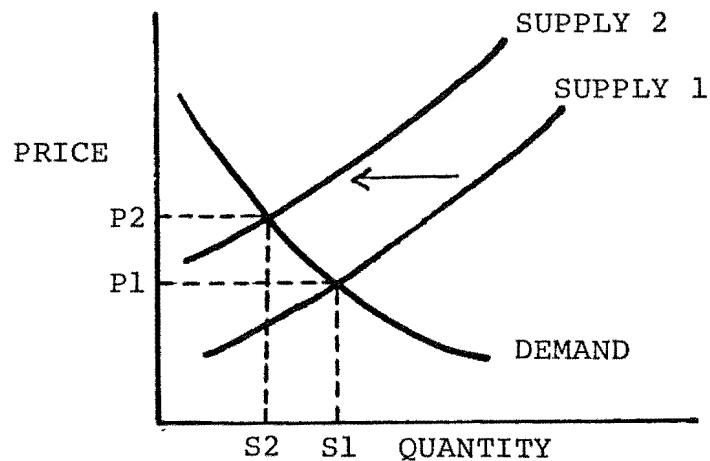


In accordance with the law of demand consumers will ordinarily buy more of a product at a low price than at a high price. Therefore the relationship between price and quantity is inverse. The law of supply stipulates that producers will offer more of a product at a higher price than they will at a low price; thus the relationship between price and quantity supplied is a direct one.

product becomes unusually scarce the price will rise, and if there is a single producer or a small group of producers acting together, who decide to restrict the supply of a particular product he or they can raise the price to an artificially high level.<sup>9</sup> The essence of competition is that there are so many sellers that each, because he is contributing an almost negligible fraction of the total supply, has virtually no control over the product price. Similarly, buyers are plentiful and act independently and thus no single buyer can manipulate the market to his advantage.

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- (9) A decrease in supply has a price increasing effect  
e.g.



- (ii) Sellers and buyers must be free to enter or leave particular markets. In particular there must be no significant obstacles preventing new firms from establishing themselves and selling their goods in competitive markets.<sup>10</sup>
- (iii) The goods and services available must be homogeneous and traded at a single price. Consequently competitive firms must be producing a standardized or approximately standardized product so that, given a single price, the consumer is indifferent as to the seller from which he purchases i.e. in a competitive market the products of firms B, C, D, E etc are looked upon by the buyer as perfect substitutes for that of firm A.
- (iv) There is perfect knowledge of the price of such commodities and products on the part of buyers and sellers.

Under conditions of perfect competition laissez-faire economic theory declares the consumer to be sovereign and rejects any argument for government intervention in the market place. Given the four assumptions outlined above, market forces are said to ensure that firms produce the goods and services that the community as a whole most wishes to consume and that these goods and services

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(10) Brozen, The Competitive Economy: Selected Readings (1975), 7.

(a) meet the minimum standards the community at large is prepared to accept; (b) are produced in the most efficient manner possible given the existing state of technology; and (c), are available within those technological limits at the lowest possible price.<sup>11</sup>

However in practice perfect competition in any market is a rare phenomenon<sup>12</sup> and the assumptions upon which perfect competition is founded do not reflect the realities of the market place for most goods and services.

First, it is generally accepted today that imperfect competition is the prevalent form of market organisation, that is, oligopoly, monopolistic competition and pure monopoly.<sup>13</sup>

*Oligopoly* is defined in the Commerce Act 1975 as meaning a situation where the market for goods and services or a large part of such a market is supplied by a small number of firms.<sup>14</sup>

A high proportion of manufacturing industries in all Western Countries are oligopolistic<sup>15</sup> and New Zealand is no exception. In New Zealand in

(11) See, for example, Lipsey, An Introduction to Positive Economics (5 ed, 1979), 243; Brozen, op. cit., 64; Samuelson, op. cit., 55; Tibor Scitovsky, Welfare and Competition (1971), Chs 20-21.

(12) Samuelson, op. cit., 43 says 'in the real world competition is nowhere near "perfect"'.

(13) See text and references below.

(14) Commerce Act 1975, s 2(1); Areeda and Turner, Anti-Trust Law (1978), Vol II, para 404(a), define it simply as a situation "in which a few relatively large sellers account for all or the bulk of the output"; see also Kaysen and Turner, Anti-Trust Policy (1959), Chapter II; Brozen, op. cit., 215.

(15) Lipsey, op. cit., 283.

1976-1977 eighty-six percent of manufacturing industries had a four firm concentration in excess of forty percent of the market.<sup>16</sup> When a few firms dominate the market their individual market shares will be significantly large so that each firm's actions and policies will have repercussions for other firms.<sup>17</sup> Bain<sup>18</sup> comments that 'there is an interdependence of non-dependence of the price and output policies of rivals, and each will determine his price and output in light of the concurrent moves or induced reactions of rival firms'. Due to the mutual interdependence peculiar to oligopoly there is considerable incentive for a group of oligopolistic manufacturers or sellers to form some sort of collusive agreement in respect of prices.<sup>19</sup>

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(16) New Zealand Census of Manufacturing 1976-1977.

(17) A characteristic of oligopoly is that usually the firms will be producing virtually standardised or homogeneous goods. Because each firm supplies a large portion of total industry output, actions taken by one firm to improve its share of the market will directly and immediately affect its rivals. For example, if one firm lowers its price it will initially gain sales at the expense of its rivals; the rivals will be forced to retaliate to recover their market shares.

(18) Industrial Organisation (1968), 29.

(19) Samuelson, op. cit., 490; Lipsey, op. cit., 284.



*Monopolistic competition* on the other hand describes a situation analogous to that of perfect competition, with the important distinction being that each firm sells a product that is somewhat differentiated from that of its competitors.<sup>20</sup> Although the firms in such an industry are producing the same general type or class of product, the particular product of each firm will have certain distinguishing features which set it off to some extent from those of other firms in the industry. The monopolistically competitive firm can effect modest price increases without losing sales to competitors because buyers recognise some difference between the products of various sellers. Consumers are likely to have definite preferences for the products of specific sellers, and relatively small price increases will not cause buyers to change their brand allegiance and seek out the close substitute products of rival firms in that industry. Entry into a monopolistically competitive industry may be difficult because a new firm must not only incur considerable research and product development costs to produce a distinguishable product, but in addition considerable advertising outlays may be necessary to inform consumers about the new product and its alleged advantages.<sup>21</sup> Finally we turn to *monopoly* which represents the most extreme departure from the model of

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(20) Samuelson, op. cit., 493; Lipsey, op. cit., 284.

(21) Keltey, New Consumerism: Selected Readings (1973), Ch.10; Tibor Scitovsky, 'Ignorance as a source of oligopoly power', [1950] American Economic Review 48.

perfect competition. Monopoly exists 'whenever an industry is in the hands of a single producer'.<sup>22</sup> It follows from this that the monopolist's product is unique in that there are no close substitutes available. From the consumer's point of view he must buy the product from the monopolist or do without. In the model of perfect competition the individual firm exercises no control over product price because it contributes only a negligible proportion of the total supply. However the pure monopolist exercises considerable control over price and the reason is obvious - the monopolist controls the total quantity supplied and by manipulating supply can cause the product price to change.

Like perfect competition, imperfect competition in the guises of oligopoly, monopolistic competition and pure monopoly are only models representing abstractions or approximations of reality; that is, between the extremes of perfect competition and pure monopoly lie an almost unlimited variety of market arrangements.<sup>23</sup> What is revealed, however, is that to the degree that competition declines so will producers and resource suppliers be less subject to the will of consumers. In light of the fact that imperfect competition prevails to a greater or lesser extent in most markets it is a fiction to cling to the concept of consumer sovereignty based upon the abstract model of perfect competition.

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(22) Lipsey, op. cit., 261; see the Commerce Act 1975, s 2(1).

(23) Samuelson, op. cit., 43 comments that 'All economic life is a blend of competitive and monopoly elements'.

Second, the assumption of freedom of entry into markets, being a cornerstone of perfect competition, is manifestly unrealistic in many cases. E. Scott Maynes<sup>24</sup> enumerates some typical barriers to entry as being

"large capital requirements, lack of access to technology, control of raw materials, or government regulation that seeks to conserve the competitors rather than competition." 25

A further formidable barrier to entry exists where economies of scale are substantial, that is, where reasonably efficient production will be possible only with a small number of producers.<sup>26</sup> Likewise where there are a limited number of producers producing a homogeneous product in an industry confronted with inelastic demand,<sup>27</sup> there is a powerful incentive towards collusion and merger. No newcomer can obtain a market share except at the expense of competitors who may collectively retaliate if the price is cut. In addition rivalry from small, relatively unknown

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(24) 'Consumer Protection: The Issues' (1979) 2 Journal of Consumer Policy 97, 100.

(25) See generally Green and Nader 'Economic Regulation vs. Competition: Uncle Sam the Monopoly Man' (1973) 82 Yale Law Journal 871.

(26) The American automobile industry provides a good illustration. General Motors, Ford and Chrysler controlled over 90 percent of the automobile market in the United States in the early 1970's. They faced very little competition from new entrants because in order to achieve the low unit costs essential to survival, any new entrants would necessarily have had to start out as large producers - this would have required enormous capital investment. See Lipsey, op cit, 222; Brozen, op cit, 264; Samuelson, op cit, 462.

(27) Where price changes result in only modest changes in amount purchased, demand is said to be inelastic.

producers sometimes fails to have any significant effect on price, quality, or selling conditions of the established firms - in fact, new firms are often unable to get a foothold because of their inability to overcome the goodwill advantage of the established enterprises.

Advertising may amount to a substantial barrier to entry and thus promote market power in the hands of a few, as, in the absence of adequate knowledge about competing goods, consumers are likely to rely upon heavily advertised goods and to trade with sellers with an established name. Superficially this may seem to be a legitimate reward for a seller who expends funds on advertising and provides consumers with information about the merits of his particular goods. However, often a product, no matter how meritorious, cannot reach the consumer unless the producer can afford a huge advertising outlay necessary to create a market share. Advertising may therefore act as a barrier to entry insulating sellers already in the market from competition. Product differentiation and the corollary of brand loyalty create a substantial goodwill advantage for established sellers and in spite of the fact that substantial profits might prevail in a particular market, new producers may not be able to overcome the barriers. A new entrant seeking to penetrate such a market must initiate a price war in an endeavour to undercut established sellers (with potentially disastrous consequences), or embark upon a major advertising campaign to dislodge or disturb existing brand loyalties. This latter course may be financially prohibitive, but even if it is not, it is fraught with difficulties in that it is easier to induce repeat pur-

chases than to occasion a switch in brands, and consequently a new entrant's campaign must be even more intensive than that of the established sellers.<sup>28</sup>

Third, goods and services available in any particular market are not necessarily homogeneous and traded at a single price.<sup>29</sup> The very essence of the monopolistically competitive firm is based upon the notion of product differentiation.<sup>30</sup> Because products are differentiated, competition

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(28) See, generally: Comandor and Wilson, Advertising and Market Power (1974), 46; Hirsch, Law and Economics (1979), 253; Simon, Issues in the Economics of Advertising (1970), 220; Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (1956). Note, that in rebuttal of the argument outlined above, advocates of unrestricted advertising argue that substantial advertising is required to achieve economies of scale and that once achieved substantial benefits accrue to the consumer which outweigh the disadvantages enumerated. While it must be conceded that some concentration is necessary if economies of scale and distribution are to be achieved and that advertising in promoting sales facilitates concentration, it is by no means clear that present levels of concentration reflect a commitment to lower unit costs, as opposed to the avoidance of price and quality competition. See Comandor and Wilson, op. cit., 217-234; Bernacchi, 'Advertising and its Discretionary Control by the FTC: A Need for Empirically Based Criteria', (1974) 52 Journal of Urban Law 223, 239.

(29) Keltey, op. cit., 120; Eugene R. Beem in his chapter 9 of this text, entitled 'The Plight of the Consumer,' comments that 'in addition to a baffling assortment of goods from which to choose, consumers are confronted with a myriad of competing qualities for most every product which they wish to buy.'

(30) See the discussion of monopolistic competition, supra.

in such industries is characterised by competition in areas other than price; in particular, emphasis is placed on product quality advertising and conditions of sale.

Advertising proclaims, and if possible, magnifies, real differences in product quality. Similarly in oligopolistic markets advertising plays an important role in the masquerade of product differentiation. Emphasis on price terms in oligopolistic situations often is avoided out of a desire to avoid price 'wars' and price cutting, and most oligopolists prefer to allocate their marketing budgets to persuade consumers that their products are different to those of competitors. As Duggan<sup>31</sup> explains

"By suggesting the existence of 'illusory' distinctions between competing brands, [advertising] can create a spurious heterogeneity ... . In short, effective product differentiation stimulated by advertising can fragment a market and so facilitate the charging of higher than competitive prices."

Free market theorists assert that a consumer's choice between competing brands of the same product will be determined by price and quality differences between the respective brands. However, advertising in promoting the cause of brand differentiation may create significant brand loyalties justifying substantially higher prices for a particular brand which is not appreciably different

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(31) 'The Great Soap Opera', (1978) 11 Melbourne University Law Review 467, 473.

from that of its competitors. In place of price and quality competition may be substituted competition in advertising.<sup>32</sup>

Finally, the assumption of perfect knowledge on the part of consumers is perhaps the least realistic as a consumer's knowledge may be imperfect for a number of reasons. While it is undoubtedly true that information about most goods and services is available as a result of sellers responding to market incentives, the nature and quality of the information generated is variable in the extreme; that is, ranging from supermarket advertising of prices and special buys to the 'ours - is - the - best' exhortation at the other end of the spectrum. For example, much advertising conveys little factual information about goods or services capable of objective assessment. As Jordan and Rubin<sup>33</sup> assert:

"Much advertising is patently uninformative; rational consumers should not care what sort of breakfast cereal is eaten by famous baseball players, nor should they expect any relationship between the cleanliness of their clothes and the catchiness of the tune used to advertise a wash powder."

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(32) See Nader and Cowan, 'Claims Without Substance', in Nader (ed), The Consumer and Corporate Accountability (1973), 97.

(33) 'An Economic Analysis of the Law of False Advertising', (1979) 8 The Journal of Legal Studies 527, 528-529.

Arguments that competitive forces generate accurate and detailed information about goods and services flounder still further when one considers the primary role of advertising, for example. The function of advertising from the point of view of the seller is to promote the sales of goods and services and it is obvious that sellers seldom will be satisfied with the mere recitation of objective facts about a product or service, and informational content of advertisements usually will be subordinated to the function of influencing and persuading a purchase of the product or service. For obvious reasons advertising will present the advantages of a particular product, and not the disadvantages and there is a marked reluctance on the part of sellers to publicise the disadvantages associated with the products of competitors through fear of retaliation.<sup>34</sup> Therefore, the consumer does not receive adequate information about goods and services to be in a 'state of perfect knowledge' and the technical complexity and multiplicity of goods make perfect knowledge an unrealistic expectation for even the most educated consumer.<sup>35</sup>

Common law protection.

Leaving for the moment the unrealistic nature of the assumptions underlying the model of perfect competition and its corollary of consumer sovereignty, it is suggested that severe reservations may be advanced to the proposition that the common law adequately protects consumers. As

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(34) See, for example, Green and Moore, 'Winter's Discontent: Market Failure and Consumer Welfare', (1973) 82 Yale Law Journal 903, 907.

(35) See Chapter IV, Statutory Control of Advertising *infra*; see also, Trebilcock, 'Consumer Protection in the Affluent Society', (1970) 16 McGill Law Journal 263, 276.



Cranston<sup>36</sup> comments

"A general feature of common law is that consumers must take the initiative to enforce their legal rights. The assumption is that consumers know their rights and are sufficiently motivated to press them. If they are harmed because a business infringes their rights, economic self interest will impel them to take action, including court action if a settlement cannot be achieved."

However in practice there are a number of factors impeding access to the courts.<sup>37</sup> The most obvious obstacle confronting a consumer is the cost of litigation. Notwithstanding the general rule that 'costs follow the event', where the amount involved is small the risk of losing is a formidable deterrent. In addition to the direct expenses of litigation, must be added opportunity costs, that is, indirect costs incurred through time spent in court, consulting lawyers, travelling to and from court and the progressive erosion of the claim by inflation.<sup>38</sup> Even where direct expenses are low, due to legal aid or where the claim is pursued before a small claims tribunal, for example, the indirect costs associated with any litigation remain. Furthermore many consumer disputes will involve an adversary who is no stranger to the legal system - for example, a finance company, insurance company or retailer. For the consumer,

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(36) Op. cit., 23.

(37) See Chapter III, infra.

(38) Phillips and Hawkins, 'Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims', (1976) 39 MLR 497.

on the other hand, contact with the legal system will be a unique experience and Galanter<sup>39</sup> advances the theory that discrepancies in the relative positions of the parties enable the stronger of the two to exploit the passivity of the legal system. Repeated access by the institutional party facilitates the mass-processing of disputes and may result in the achievement of economies of scale. Obviously the institutional party will have financial resources far in excess of most individual consumer litigants and the relative poverty of the individual means that he or she will rarely be in a position to resist an offer of settlement. Consumer ignorance highlights yet another deficiency of the common law in protecting consumers.<sup>40</sup> Consumers are often ignorant of their legal rights and remedies by which their grievances may be redressed. For example, a consumer's statutory right to cancel a door-to-door sales agreement will be of no use to him unless he is aware of that right's existence. It is also said to be a feature of certain consumer offences that they are complex, diffused over time and unpublicized.<sup>41</sup> For example, the adverse effects of some food additives and drugs do not manifest themselves until they have been used over a period of time and where large numbers of the public are only affected to a small degree the likelihood of them aggregating to collectively

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(39) 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', (1974) 9 Law and Society Review 95.

(40) See Chapter III, infra.

(41) Cranston 'Creeping Economism: Some Thoughts on Law and Economics', (1977) 4 British Journal of Law and Society 103, 109.

complain is very small.<sup>42</sup> In respect of products that are potentially dangerous to the consumer some pre-market filter mechanism is essential, but the common law looks to the cure in the form of damages, rather than prevention. For these reasons, and for others that will become apparent below, the consumer cannot rely exclusively on the common law for his or her protection.

Given that market arrangements usually reflect imperfect competition to a greater or lesser extent, and given the limitations of the common law, it is obvious that some level of government intervention in the marketplace is necessary. However, a significant point that emerges from the discussion of economic theory above is that, generally speaking, the more effective the competition within any nominally free enterprise market the better the position of consumers within it. Competition within an economy based upon free enterprise performs the vital function of ensuring that prices reflect the levels of supply and demand, that producers are efficient and profits reasonable, and that innovation, technological improvement and cost reduction are vigorously pursued.<sup>43</sup> Dickey and Ward<sup>44</sup> state that

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(42) See Chapter III, infra.

(43) See generally, Tibor Scitovsky, Welfare and Competition (1971), esp. Chapters 20-21; Lipsey, op. cit., chapter 5.

(44) 'Consumer Legislation in Socio-Economic Perspective: Observations from the Enactments of One State', (1978) 13 University of Western Australia Law Review 378, 381. See also Dickey and Ward, 'The Adequacy of Australian Consumer Protection Legislation - Observations and Proposals from Economic Theory,' (1979) 14 University of Western Australia Law Review 133.

"Competition acts as a purifying agent within a free enterprise market; it provides an impersonal force which purges such markets of inefficient businesses and with them all forms of anti-consumer practices, particularly the manipulation of the price and quality of goods for the sole benefit of the businesses involved. Accordingly, all other things being equal, the best consumer legislation is that which creates the most favourable conditions under which effective competition can thrive."

Consequently, while only a few industries' market structures approximate to the model of perfect competition, the purely competitive market model provides a norm against which less competitive markets may be evaluated<sup>45</sup> and a goal to which market regulations and control might appropriately be directed.

The real problem facing any legislature then is to strike a balance between consumer protection and market intervention on the one hand and market freedom on the other. At the outset the decision of whether or not to intervene is complicated by the difficulty in ascertaining the real level of competition in many markets and in determining to what extent any distortions may be cured by legislative intervention.<sup>46</sup> Free market economists are critical of much of the legislation passed on behalf of the consumer and decry regulation. For example, Clair Wilcox<sup>47</sup> argues

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(45) As Posner, Economic Analysis of Law (2 ed 1977), 13, stresses: "... lack of realism, far from invalidating the theory, is the essential pre-condition of theory."

(46) Cayne and Trebilcock, 'Market considerations in the Formulation of Consumer Protection Policy', (1973) 23 University of Toronto Law Journal 396.

(47) Public Policies Toward Business (1966), 476-477.

"Regulation cannot set prices below an industry's costs however excessive they may be. Competition does so, and the high cost company is compelled to discover means whereby its costs can be reduced. Regulation does not enlarge consumption by setting prices at the lowest level consistent with a fair return. Competition has this effect. Regulation fails to encourage performance in the public interest by offering rewards and penalties. Competition offers both."

Thus regulation in the eyes of free market economists is a pallid substitute for competition. Briefly, the arguments that may be ranged against government regulation are as follows:-

- (i) Market failure doesn't automatically call for government intervention. Winter<sup>48</sup> argues that markets fail in varying degrees and government intervention cannot be justified unless the benefits exceed the costs. For example, it is suggested that drug regulation severely impedes the rate of introduction of new drugs and thus prevents beneficial as well as harmful drugs from entering the market. The danger of a thalidomide being marketed must be weighed against the danger of a penicillin being suppressed.<sup>49</sup>

Furthermore, as the Molony Committee point out

"The consumer is the taxpayer, and we see small merit in creating an elaborate new system to assist him in one capacity, when he would have to pay for it in the other. In so far as any increased cost fell on industry, recoupment from the consumer would be no less inevitable." 50

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(48) 'Economic Regulation vs Capitalism ; Ralph Nader and Creeping Capitalism', (1973) 82 Yale Law Journal 890, 894.

(49) Turner, The Chemical Feast (1970), 225; Winter, The Consumer Advocate Versus The Consumer (1972), 5.

(50) Final Report of the Committee on Consumer Protection, op.cit; para. 16.

This argument may be further illustrated by reference to the advertising industry. Advertisers argue that advertising promotes full employment by inducing high levels of consumer spending. This is said to be particularly crucial in a wealthy society where much production takes the form of luxury or semi-luxury goods. One does not need to advertise to sell food to a hungry person, but advertising and sales promotion are essential in persuading consumers that they need a colour television, a stereo system or an automatic dishwasher. Thus it is argued that stability in an opulent society calls for extensive want creating activities - in particular, advertising - or high levels of production and employment will not be sustainable. It is argued that Government regulation and intrusion into the market place by regulating advertising may have a detrimental effect on production and employment. For example, Bernard Holt, Federal Director of the Association of Advertising Agencies, remarked that

"It would not be too unkind to suggest that (the critics) in venting their spleen against advertising, they are really, whether they know it or not, striking out against the free enterprise system ... . Quite obviously this (advertising) expenditure serves our society through wages and prices - wages, in that mass produced products and readily available services have to be sold to the consumer for the economy to work at all. To be sold they have to be wanted. This is advertising's role - to make them wanted. The more goods and services are sold the more people are employed."

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(51) Reported in Goldring and Maher, Consumer Protection Law in Australia (1979), 232.

However the consensus of opinion among economists is that advertising affects the composition, more than it does the volume of spending, and there is a general reluctance to concede a close correlation between the volume of advertising and levels of output and employment.<sup>52</sup> It is not this writer's intention to become embroiled in this debate, for even conceding such a close correlation, it does not follow that misleading or deceptive advertising should escape regulation and modification. Nevertheless, the point that does emerge is that careful assessment of the costs and benefits must be made before any regulation is introduced.<sup>53</sup>

- (ii) Regulation often diminishes competition and promotes monopoly power. For example, a feature of many regulatory schemes is that control is exercised on the entry of new competitors into the regulated industry. While such entry restrictions are often

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(52) See, for example; Telser, 'Advertising and Competition', (1964) *Journal of Political Economy* 537; McConnell, op.cit., 518; Cannon, Advertising: The Economic Implications (1974), 39-62.

(53) As Layton and Holmes, 'Consumerism: A passing malaise or a continuing expression of social concern', comment in 46 *Australian Quarterly* 6, at 23-24: 'It would seem that in assessing any programme of consumer protection, we must ... seek to establish that particular balance between exploitation and over protection that yields the minimum social cost to the community'.

essential in the public interest<sup>54</sup> some regulation amounts to the tyranny of the status quo.<sup>55</sup> In addition set prices for particular goods and services to ensure a predetermined rate of return for all firms in a regulated industry is seen as an unwelcome restraint on pure competition. Furthermore Green and Nader<sup>56</sup> argue that this leads to 'technological lethargy' ie, a firm with a fixed rate of return and protected from outside competition due to entry restrictions has no incentive to be innovative.

(iii) Another major criticism of regulation relates to the 'processes of regulation'.<sup>57</sup> Delay, inflexibility and inadequate information for accurate decision-making are all charges levelled at government regulatory bodies. Furthermore it is argued that 'government by its very nature reacts to political pressure, rather than impartial standards'.<sup>58</sup>

(iv) Statutory intervention is said to be unnecessary in light of the self-enforcement and regulatory procedures that already exist in the commercial community. Business self regulation is said to enjoy a number of advantages over legislative control in

(54) Occupational licensing of medical practitioners and legal practitioners, for example.

(55) See Chapter II, Self-Regulation, infra.

(56) op. cit., 881.

(57) Winter, op. cit., 894; see also, Green and Nader, op. cit., 875.

(58) Winter, op. cit., 893.



that it is cheap, flexible and more effective.<sup>59</sup> Furthermore it is argued that businesses who introduce self regulatory codes are more likely to comply with the spirit as well as the letter of the code, than be resistant, as they would be to statutory regulation. Standards established in a self regulatory system can be applied in a common sense practical way and not in the legalistic technical way of legislative controls.

For these reasons the free market advocates view market intervention by the government with a well developed scepticism.

However the arguments for regulation are no less cogent and the following matters deserve mention:-

- (i) Regulation when employed appropriately may correct various distortions in the economy and encourage competition.<sup>60</sup> Take advertising, for example. While accurate and informative advertising undoubtedly stimulates product improvement and facilitates price and quality comparisons, misleading and deceptive advertising may result in a misallocation of resources through expenditures on inferior goods

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(59) See Cranston, op. cit., 61.

(60) For example, anti-monopoly legislation; see the Commerce Act 1975.

or, as instanced above, by diverting trade to higher priced goods that differ from cheaper substitutes only in terms of the quality and quantity of advertising expended in their promotion. If producers spend more and more money on inflated and misleading advertising campaigns rather than concentrating on product improvement or price competition to expand their market share, the result is both the exploitation of the consumer and the undermining of serious meaningful competition. Pitofsky<sup>61</sup> contends further that

"(d)eceptive advertising if not controlled can eventually undermine the whole competitive system by reducing the extent to which consumers will rely on product claims and descriptions."

Viewed in this perspective, false or deceptive advertisers are in effect 'free riders' profiting from the reputation of advertisers who are accurate and truthful. As the consumer cannot determine truth from falsity from the face of an advertisement, the existence of some false or misleading advertising casts a cloud over all advertising and weakens consumer confidence.

- (ii) Social welfare considerations may dictate regulation regardless of economic factors. Promotion of competition may be a secondary goal; e.g. when the safety of consumers is at stake it may be

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(61) 'Beyond Nader: Consumer Protection and the Regulation of Advertising', (1977) 90 Harvard Law Review 661, 671.

preferable to impose exceptionally high standards in respect of potentially dangerous goods even though this might reduce the number of firms and consequently the degree of competitiveness in the market due to the increased costs.<sup>62</sup>

(iii) The market system often fails to register all the costs associated with the production of certain goods and services. These costs are not taken into account by the producer because they are not internal to the firm. Illustrations of such costs are the smoke, smog, and pollution which have characterised the production of certain products. These costs which economists call 'externalities'<sup>63</sup> are necessarily controlled by regulation. For example, firms may be forced by regulation to adopt alternative but more costly techniques of production that cause less pollution.<sup>64</sup> Arguments about the social costs of advertising also abound. Critics point to the environmental pollution of unsightly bill boards and posters, claim that the independence of the media is threatened, assert that advertising is an unacceptable form of psychological conditioning<sup>65</sup> and that much

(62) Green and Nader, op. cit., 885; Winter, op. cit., 895; Dickey and Ward, op. cit., 382.

(63) Lipsey, op. cit., 436; Samuelson, op. cit., 453.

(64) Ibid.

(65) Trebilcock, Loc. cit., 271.

advertising offends one's common sense and tries the patience of society. Furthermore, Galbraith<sup>66</sup> asserts that

'It will surely be agreed that whatever the effects of advertising its ultimate effect is an extremely powerful and sustained propaganda on the importance of goods. No similar case is made on behalf of artistic, educational and other humane achievement.'

To this extent advertising is said to create an imbalance between the demand for private and public goods. On the other hand proponents of advertising see it as supporting national communications, 'enriching mass culture',<sup>67</sup> increasing enjoyment of life by increasing peoples wants and considerably enlivening the market place.

- (iv) Regulation may ensure that adequate information reaches the consumer about goods and services so as to facilitate rational choice.<sup>68</sup> For example, nutritional labelling, code dating, disclosure of

(66) 'Economics as a system of belief' in Wheelwright and Stilwell (eds), Readings in Political Economy Vol. 2 (1976), 37.

(67) Collinge, Law of Marketing in Australia and New Zealand (1971), 208.

(68) Green and Moore, op cit, 906; see Chapter IV, Statutory Control of Advertising, infra.

true lending rate provisions all may improve the consumer's position. Given the enormous expenditure on advertising each year,<sup>69</sup> and recognising that ultimately these costs are born by the consumer,<sup>70</sup> the consumer is entitled to scrupulously accurate, fair and informative advertising and disclosure generally.

- (v) Business self regulation is structured on a voluntary basis and often such voluntary codes of conduct flounder as there are no means to enforce them.<sup>71</sup> Furthermore business self-interest and the profit motive may be diametrically opposed to the consumer interest; businessmen are not likely to promote and support any form of regulation that infringes upon profits.<sup>72</sup> Furthermore the argument in favour of business self regulation is strongest in so far as it relates to established firms and trade associations

- (69) Advertising revenue for newspapers and periodicals in New Zealand during the 1976-1977 financial year was \$80 million, while radio and television advertising revenues during the same period amounted to \$42 million. Source: New Zealand Official Yearbook 1979, 340-342.
- (70) Chamberlin, The Theory of Monopolistic Competition (1931), 123 states that: 'In the last analysis, these costs born by the consumer, must be counted as selling costs - costs of altering his demands, rather than as production costs - costs of satisfying them'; see also Baran and Sweezy, 'The Absorption of Surplus: The Sales Effort' in Wheelwright and Stilwell (eds), Readings in Political Economy Vol 2 (1976), 44; Trebilcock, op.cit., 278 remarks that: 'The consumer pays dearly for the benefit, if any, that he derives from being told what he wants'.
- (71) See Chapter II, infra.
- (72) Idem.

but many consumer complaints are directed against less reputable firms who may not even be participants in a scheme of business self regulation.<sup>73</sup>

The above arguments in favour of legislative control convincingly demonstrate the need for some government intervention in the marketplace although the negative characteristics of regulation that were stressed earlier must always be born in mind in assessing the necessity for intervention.

### (3) THE BASIC OBJECTIVES

The second fundamental question is: what should be the basic objectives of consumer protection legislation? An adequate answer to this question presupposes an identification of the problems facing the consumer in modern society. Briefly the following may be stressed:

- (i) Modern business demonstrates a capacity to sustain an almost unceasing flow of mass produced new goods due to advanced technology coupled with efficient research and management. However, this very success, while producing the reward of high living standards, has made the task of accurate and wise selection exceedingly difficult even for sophisticated consumers. Compounding the problems of multiplicity and variety of goods is the complexity of many of them. As one writer<sup>74</sup> observes:

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(73) Collinge, op. cit., 15.

(74) Green, 'Appropriateness and Responsiveness: Can the Government Protect the Consumer?' (1974) 8 Journal of Economic Issues 309, 310; cited in Cranston, Consumers and the Law (1978), 2.

"How does an average consumer know how much unhealthy radiation is being emitted from a microwave oven or from his dentist's x-ray machine? Should we assume a car buyer can know whether his purchase's motor mounts will fail, or when; or whether tasteless and odourless carbon monoxide is seeping into the passenger compartment from the exhaust system; or whether the drug he purchases is effective or toxic?"

As mentioned above, advertising is frequently unhelpful as a source of information to guide the consumer to a rational choice. While advertising does provide the consumer with a great deal of information about goods and services, the quality of the information provided is often seriously deficient and even misleading and false. Market incentives do not lead to the disclosure of certain types of information, in any event, as in the interests of survival certain types of information will be avoided deliberately. For example, it would be mutually disadvantageous for rival cigarette producers to stress low tar and nicotine content arguments and hence unduly emphasise the health problem.

- (ii) Many goods and services that are marketed are sub-standard, dangerous or worthless. A perusal of any *Consumer*<sup>75</sup> magazine will serve to confirm this allegation if personal experience does not provide confirmation.

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(75) Published by the Consumer Council of New Zealand, constituted under the Consumer Council Act 1966.

(iii) Inequality in bargaining power is a further serious problem. The concept of freedom of contract, with its roots in the social, economic and political philosophies of the sixteenth and seventeenth centuries,<sup>76</sup> is based upon the premise that both parties to a contract are bargaining from a position of equal strength, and that each is free to accept or reject any term that the other might wish to impose in the contract. This fails to take into account the fact that true equality rarely exists and the fact that many contracts are the result of necessity. As Jacobsen<sup>77</sup> describes the position of the consumer:

"... he can either accept the contract as it is without any changes, or refuse to become a party thereto. In fact very often, or almost always, the supplier is the only one, or one of few, who is in a position to supply the required services or the necessary goods - and the suggested option of the consumer is merely theoretical for in fact it does not exist."

This inequality is also apparent when the consumer seeks redress. Although this writer is in agreement with Cranston<sup>78</sup> when he comments that '(m)any businesses adopt a positive attitude to consumer grievances' the consumer is in a weak bargaining

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(76) See, for example: Grotius, Inleidinge, 3.1.10; John Locke, The Second Treatise of Government, Ch. II.

(77) 'The Standard Contracts Law of Israel', (1968) 12 Journal of Business Law 325; see also Ziegel, 'The Future of Canadian Consumerism', (1973) 51 Canadian Bar Review 191.

(78) Op. cit., 2.



position due to the disparity in knowledge and resources between the parties.<sup>79</sup> Ignorance of legal rights, inadequate funds and delays in court processes all deter consumers from litigation.

- (iv) As stressed above, the concept of absolute consumer sovereignty rests upon the ideal of perfect competition and, generally speaking, as competition declines so will the consumer's strength in the market place diminish. Where 'workable competition'<sup>80</sup> does not exist in a particular industry consumers may be exploited in any or all of the following ways: (1) restriction of output; (2) exorbitant prices; (3) delay in, or prevention of, quality improvements; (4) quality deterioration or induced obsolescence in order to speed up replacement sales; (5) less option to consumers as to conditions of sale.

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(79) Supra.

(80) 'Workable competition' has been defined as 'a situation in which there is a sufficient market rivalry to compel firms to produce with internal efficiency, to price in accordance with costs, to meet the consumers' demand for variety, and to strive for product and process improvement. Thus a workably competitive industry has two characteristics: first, the industry is reasonably efficient and progressive and, second, the efficiency and progressiveness has been achieved through impersonal market forces', Brunt, 'Legislation in Search of an objective', in Nieuwenhuysen (ed), Australian Trade Practices: Readings (1970), 238. See also, Collinge, op.cit, 10.

In the light of these major problems facing the consumer it is suggested that the following objectives should be pursued:-

- (a) Promotion of competition. Due to the recognised benefits of competitive pressures the consumer generally will be best served by legislation that seeks to ensure that workable competition obtains in the market place - the word 'workable' is used advisedly in that 'perfect' competition in the vast majority of markets is unobtainable, and the object of legislation in promoting competition must be tempered by the realities of the market place. Competition may be bolstered not only by controlling monopolies, mergers and takeovers, but also by the control and regulation of unfair and unscrupulous trade practices which are contrary to the consumer interest. Control of unfair trade practices not only directly protects consumers from unscrupulous firms, but is beneficial to reputable and honest firms in that they are not forced to match these practices in order to retain their market share.<sup>81</sup> Where advertising is anti-competitive, to the extent that it functions as a surrogate for price competition and to the extent that it constitutes a formidable barrier to entry, there is a clear need for control.

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(81) For example, purchasing decisions based upon misleading advertising claims lead to serious misallocations of resources in that trade is diverted away from honest traders and away from the 'better' product.

Of course, the objective of fostering workable competition is not always appropriate. The consumer interest may dictate safety or health regulations that directly inhibits competition and economists will be quick to point out that economies of large scale production<sup>82</sup> may only be obtainable if a few firms operate in a particular market; that is, industrial concentration may be better for consumers in that the application of sophisticated production techniques are conducive to lower costs of production and, consequently, lower prices to the consumer.

- (b) The quantity and quality of information that the consumer receives must be improved. The United States Special Committee on Retail Instalment Sales, Consumer Credit, Small Loans and Usury said:

"It is fair to ask precisely what it is that the consumer is to be protected from. Must he be protected from his own lack of knowledge or discipline which leads him to take advantage of easy credit to buy things he does not need or cannot afford? Is he to be protected from the 'fringe' operator who may take advantage of the ignorance and gullibility of the consumer to cause him to overbuy or pay too much?" 83

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(82) See McConnell, op. cit., 523-524; Samuelson, op. cit., 25, 34, 462.

(83) This quotation from the US Special Committee Report at page 9 appears in M.J. Trebilcock's article 'Consumer Protection in the Affluent Society', (1970) 16 McGill Law Journal 263.

Trebilcock<sup>84</sup> says that it is implicit from this statement that the promotion of 'prudent shopping decisions' is a fundamental objective of consumer protection legislation. Before a prudent shopping decision can be made the consumer must be in possession of adequate information about goods and services available, together with information about the true cost if credit is available. The provision of adequate information can never ensure that consumers will make a rational choice,<sup>85</sup> but nevertheless the absence of such information deprives the consumer of even the possibility of reaching a reasoned decision.

In order to facilitate the attainment of this objective disclosure legislation and sanctioning of deceptions in packaging, labelling, advertising and selling are necessary. Furthermore the establishment of consumer agencies which provide information on a comparative basis to subscribers is a vital supplement to state disclosure requirements.

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(84) Loc.cit., 264.

(85) Cayne and Trebilcock, 'Market Considerations and Consumer Protection Policy', (1973) 23 University of Toronto Law Journal 396, 406 comment that "... inability to utilise information will always subvert a disclosure requirement. The educational inadequacies associated with poverty are relevant in this context".

- (c) The goods and services available in the market place must be of reasonable quality having regard to such criteria as their price and any description applied to them. Furthermore in the interests of health and safety certain categories of goods and services must meet minimum quality standards. For example, occupational licensing must ensure that a minimum standard of competence prevails in a given profession, such as dentistry, and drug regulation must prevent the distribution of inadequately tested and potentially dangerous medicines and drugs.
- (d) Redress of certain imbalances in bargaining power. Jacobson<sup>86</sup> argues that:

"... it is among the duties of the legislator in the modern world to protect people even against their own folly, not to permit exploitation, and to remove any manifest unfairness. The protection of consumers is gradually becoming a recognised feature in modern law and it inevitably involves limitations upon the doctrine of freedom of contract."

Serious consideration must be accorded to proposals advocating that suppliers of goods and services may not contract out of certain quality standards and other normal incidents of consumer transactions unless in all the circumstances it is reasonable to do so. Particular powers to reopen extortionate bargains and a general doctrine of unconscionability will further counteract inequalities in bargaining power.

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(86) Op cit, 326.

(e) Facilitate consumer redress. Given the undeniable dependency of substantive<sup>rights</sup>/~~on~~ procedural rights, a vast body of substantive rights will not assist the consumer if his avenues of redress are inadequate. Some of the obstacles impeding access by consumers to the ordinary courts may be alleviated by the provision of legal aid or by allowing class actions or substituted actions. Alternatively, impediments associated with the ordinary courts may be by-passed by the creation of special courts for the resolution of consumer grievances; e.g., small claims tribunals and market courts. It is essential that the consumer have ready and relatively inexpensive access to the courts and tribunals to obtain redress for legitimate complaints in relation to relatively minor matters.

The law in pursuit of these objectives obviously must maintain a fine balance. Notwithstanding distortions in the market caution should be exercised lest the cost of the cure exceed the benefit proposed. As Atiyah<sup>87</sup> comments, 'Social questions cannot always be reduced to mercenary financial considerations' but "it is absurd to think that it is rational - even in matters of social policy - to buy something without paying attention to the price'. Consumer legislation is not enacted in a vacuum, but in a dynamic economic system, and it may be patently wrong to assume that merely because legislation

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(87) 'Consumer Protection - Time to Take Stock', (1979)  
1 Liverpool Law Review 20, 39-40.

has increased consumer rights *vis-a-vis* firms in the marketplace that it necessarily follows that they will be better off in the long term.<sup>88</sup> Furthermore, while the existence of problems and distortions in the market dictate regulation, this does not lead one to the irresistible and inevitable conclusion that there should be government regulation. Industry or business self regulation may overcome many of the problems outlined more cheaply than governmental intervention and it is theoretically possible for the consumer's interests to be protected by resort to the courts, either by the consumers themselves, or by those sellers with superior products who see their market shares declining in the face of inroads based on inaccurate and/or deceptive marketing practices. Therefore a balancing process must be undertaken; the costs and benefits of any market intervention must be weighed in the balance and there must be a careful evaluation of the various modes of redressing the problem. For those who regard consumer protection as being no more than a 'band

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(88) For example; the enactment of legislation subjecting exemption clauses to the test of reasonableness may encourage firms habitually employing such clauses to raise their prices to cover the cost of additional insurance (see Atiyah, *ibid*, 39-44); to insist on the suppression of advocacy in advertising in the name of objective recitation of facts might well succeed only in frustrating the whole object of the exercise by discouraging sellers and producers from advertising at all (see Winter, The Consumer Advocate Versus the Consumer (1972), 10).

aid on the malignancy of capitalism',<sup>89</sup> or for those who see this body of law as an unwelcome departure from the laissez-faire approach and the underlying philosophy of individualism,<sup>90</sup> such a balance is not possible. Like Cranston,<sup>91</sup> this writer believes that 'social engineering' within the present private enterprise system is worthwhile and necessary. It is clear that the law should not be so favourable to the consumer that it encourages evasion or dereliction of the consumer's responsibility to protect himself, nor should the law ignore the necessity to protect the consumer against abuses which, for practical purposes, are outside his control. To conclude this brief outline of the objectives of consumer protection the following remark by Atiyah<sup>92</sup> may be borne in mind:

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(89) Goldring, 'Consumer Protection and the Trade Practices Act', (1974-75) 6 Federal Law Review 288.

(90) Friedman, Capitalism and Freedom (1962), 5.

(91) Op.cit., 9.

(92) Loc.cit., 44.



"... it is not necessarily the best policy to frame our consumer protection laws on the basis of the maxim, *lex procurator fatuorum est* - the law is the protector of the stupid.'

I turn now to a consideration of the rules, legal and voluntary, which regulate the provision of information pertaining to goods and services and associated credit in the New Zealand economy. Naturally the scope of this dissertation precludes a discussion of all the objectives outlined above as they relate to consumer protection in general, but it is important to take cognisance of most of these general objectives in assessing the adequacy, need, and control of consumer information in this country.

## II BUSINESS SELF-REGULATION

### 1. INTRODUCTION

Various professions, trade associations and other representative bodies in New Zealand have promulgated self regulatory codes of conduct, ethics and practice that supplement the requirements of the law.<sup>1</sup> Business self-regulation possesses the potential to advance considerably the consumer interest and in the United Kingdom, for example, the Director General of Fair Trading is under a duty to encourage trade associations to prepare and disseminate codes of practice that will safeguard and promote the interests of the public.<sup>2</sup> A recent New Zealand Government Report<sup>3</sup> recommends that a similar promotional, as well as a monitoring function, be accorded the Consumers' Institute.

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- (1) See, for example, the Newspaper Publishers Association's Codes of Advertising Practice; the Pharmaceutical Society's Code of Ethics; the New Zealand Finance Houses Association (Inc) Code of Ethics and Standards of Conduct; the Footwear Industry Code; and Solar Heating Industry Code, the Direct Selling Association Code of Ethics; and the Real Estate Institute of New Zealand Code of Ethics.
  - (2) Fair Trading Act 1973, s 124(3).
  - (3) Report of the Working Party reviewing certain Consumer and Commercial Legislation, Proposals for a Selling Practices Act (1980), 18-20; hereinafter cited as the Martin Report, the Chairman of the Working Party being Mr H.E. Martin.

Self-regulation has its origins in a number of factors: *First*, businesses have sought through voluntary codes of conduct to demonstrate their sense of social responsibility and, at the same time, to promote their corporate image. Fortunately for the consumer not all businesses subscribe exclusively to the view expressed by Milton Friedman<sup>4</sup> that:

"Few trends could so thoroughly undermine the very foundation of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their shareholders as possible. This is a fundamentally subversive doctrine."

This vocal and erudite campaigner for *laissez faire* economic policies regards the pursuit of profit as the sole responsibility of businesses and any controls, legal or otherwise, are perceived as superfluous and detrimental in light of the purging effect of market competitive forces. With respect to the corporate image point, codes attract favourable publicity for the association or industry producing them because of the impression that voluntary consumer protection measures are being introduced. *Second*, the threat of more restrictive statutory intervention has been a powerful inducement to some groups to adopt some form of self-regulation to accommodate the consumer interest.<sup>5</sup>

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(4) Capitalism and Freedom (1962), 133; cited in Cranston, Consumers and the Law (1978), 30.

(5) See Page, 'Self Regulation and Codes of Practice', (1980) The Journal of Business Law 24, 26.

For example, the Code of Advertising Practice drawn up by the Advertising Association in Britain in the early 1960's was done under threat of statutory control as a result of the work of the Molony Committee<sup>6</sup> and the formation of the Press Council<sup>7</sup> in New Zealand in 1972 is another voluntary organisation whose existence is attributable, at least in part, to a fear of undesirable statutory intervention. Similarly, industry regulation of prescription drug advertising in Australia, which is embodied in a code of business practice administered by the Australian Pharmaceutical Manufacturers Association, was introduced in an attempt to pre-empt the institution and implementation of proposed advertising regulations in this area.<sup>8</sup> An editorial in the Australian Medical Journal<sup>9</sup> urged support for the voluntary scheme in the following way:

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(6) Cranston, op.cit., 46.

(7) A four-member council sponsored by the Newspaper Publishers Association and the Journalists Association. Generally see Burrows, News Media Law In New Zealand (2 ed, 1980), 418.

(8) See Darvall, 'Self-Regulation of Advertising and the Consumer Interest,' (1980)8 Australian Business Law Review 309, 316.

(9) (1974)2 Medical Journal of Australia 189, 190; cited in Darvall, idem.

[V]oluntary self regulation, responsibly administered....will achieve all that governments should reasonably want to ask for in relation to pharmaceutical advertising in medical journals. We strongly urge the Australian and State governments and governmental agencies to leave the matter alone, for the present at least.<sup>10</sup>

*Third*, some forms of business self regulation are devised primarily to control businesses within an industry to the mutual economic benefit of practitioners, and such self regulation may or may not be in the consumer interest. For example, many self regulatory codes embody licensing, registration or accreditation schemes whereby the right to carry on business or to receive certain benefits is dependent upon the satisfaction of criteria laid down in the relevant codes. For example, the Media Council of Australia<sup>11</sup> administers an agency accreditation scheme whereby advertising agents<sup>12</sup> who can

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(10) To date no governmental regulation of prescription drug advertising has occurred in Australia; see Darvall, loc.cit., 318.

(11) This is an unincorporated voluntary association of seven other associations; viz; the Australian Newspapers Council; Australian Accreditation Bureau; Federation of Australian Commercial Broadcasters; Federation of Australian Commercial Television Stations; Australian Provincial Press Association; Regional Dailies of Australia Ltd; Australian Magazine Publishers Association.

(12) Advertising agents are the conduits between the advertisers (or customers) and the media; he acts as an agent for the advertiser whose advertising he is placing; nevertheless the advertising agent in promoting advertising and checking material against standards etc. performs a valuable service for media proprietors and is rewarded by payment of a commission on space booked by him: see *Re Herald & Weekly Times* (1978) 17 ALR 281, 318.

satisfy criteria as to financial structure, size and continuity may be accredited. The accreditation rules provide that all advertisements submitted to a media proprietor must conform with the Media Council of Australia Code of Ethics which are designed to encourage honesty, fairness and responsibility in advertising. The grant of accreditation carries with it certain privileges, as well as obligations such as the need to comply with the code of ethics; in particular 'only accredited agents shall be eligible to receive commission'. This latter rule was subjected to judicial scrutiny in *Re Herald & Weekly Times Ltd*<sup>13</sup> when the Trade Practices Tribunal were asked to review a determination of the Trade Practices Commission who had granted authorisation to the accreditation rules subject to the above rule being abandoned. The Trade Practices Tribunal observed that

"[This rule] places the advertising agent without the system at a significant competitive disadvantage *vis-a-vis* the advertising agent within the system".<sup>14</sup>

However the Tribunal found that the accreditation scheme created considerable benefits to the public in, *inter alia*, maintaining advertising standards of ethical behaviour, and if the rule were eliminated some large advertisers would have no incentive to remain in the accreditation scheme, and the scheme could be eroded and, ultimately,

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(13) Ibid.

(14) Ibid, 325.

collapse.<sup>15</sup> Therefore it was decided that it was in the consumer interest to retain the rule, notwithstanding its anti-competitive effect on non-accredited advertising agents.

*Fourth*, legislators<sup>16</sup> have exhibited a preference for this form of regulation and in some areas it is extremely difficult to frame adequate statutory controls.

## 2. ADVANTAGES AND DISADVANTAGES

Before turning to a consideration of self regulation in the consumer information field, it is proposed to isolate some of the merits and demerits of self regulation. There are a number of reasons for favouring business self regulation over statutory control. For one thing, business self regulation does not involve the consumer in any direct cost and conserves public resources. Furthermore a self regulatory system is arguably more efficient and effective than its statutory counterpart. Proponents of business self regulation point in particular to the flexibility inherent in such a system and argue that as guidelines in a self regulatory system are non-legal they may be changed with a minimum of disruption. For example, the Association

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(15) The accreditation scheme imposes obligations on accredited agents and one of the inducements to join the scheme rests in this rule; by removing the rule the advantages of accreditation may be outweighed by the restraints to which the system subjects them. See the judgement at pages 325-326.

(16) See, for example; the Fair Trading Act 1973 (U.K.), s 124(3), and the statutory obligation to promote such Codes; the Martin Report, at 11.

of British Travel Agents Code of Practice was substantially amended only six months after promulgation following complaints from consumers about surcharges and hotel overbooking.<sup>17</sup> This potential for quick revision and responsiveness to consumer pressure is a substantial factor in favour of codes of practice.

As far as effectiveness of business self regulation goes, it is asserted that codes of practice may cover areas and practices beyond the scope of adequate statutory regulation. For example, the Securities Commission,<sup>18</sup> commenting on a submission by the Committee of Advertising Practice that self regulation of financial advertising should be the primary tier of control with adequate legislative support constituting the second tier, concurred in the Committee's view that 'it is impossible to draft regulations defining lawful copy content once it is accepted that an advertiser should be at liberty to be interesting and informative i.e. an advertiser could circumvent any direct prohibition by 'indirect insinuation and suggestion'.<sup>19</sup> However, insofar as codes and legislation employ similar terminology and concepts (such as 'false', 'deceptive', 'misleading', etc) to categorise

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(17) See Cranston, *op cit*, 61.

(18) Proposed Recommendations for Securities Regulations (1980), 12.3.2.

(19) Idem.



prohibited conduct, it is difficult to see how self regulation will succeed where legislation fails; problems of interpretation will exist for both inasmuch as they must be reduced to writing and adherence to the letter of the law or rule will not necessarily entail compliance with the spirit of the same law or rule.

A real advantage of a number of codes, each regulating a particular industry, is that each may be formulated with the idiosyncratic problems of each industry in mind.<sup>20</sup> Legislation, of necessity, must be more general in the obligations that it imposes and it may be virtually impossible to cover with sufficient particularity the problems encountered in numerous and diverse industries, trades and professions. Conversely with self regulation many practices like expeditious handling of complaints, delays in servicing, clarity in documentation, or periods for which spare parts must be available, may be dealt with in sufficient detail. Moreover, codes of practice may well be in advance of legal provisions and be more favourable to consumers.<sup>21</sup>

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(20) See Marsh, 'Voluntary Codes of Practice', (1977) 127 New Law Journal 419.

(21) See Cranston, *op.cit.*, 34 where he observes that: "In some respects the codes of practice approved by the Office of Fair Trading are in advance of the law, in that they cover trade practices for which legal measures have been suggested but not yet adopted"; for example, "value" and "worth" claims, and mandatory price marking on all goods and services.

It is suggested<sup>22</sup> that businesses who introduce self-regulatory codes are more likely to comply with the spirit as well as the letter of the code, whereas with statutory regulation the incentive is often to evade the law and to find loopholes.<sup>23</sup> This distinction is attributed to "businesses' interest in the proper implementation of something they have established and from their greater willingness to comply with peer group pressure than when confronted with force".<sup>24</sup> Finally, self regulatory systems may be applied in a common sense practical way and not in the technical way of legislative controls and many systems establish elaborate conciliation and arbitration procedures facilitating speedy resolution of consumer complaints.<sup>25</sup>

As against this formidable array of real and imagined advantages that may attach to self regulation, can be

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(22) See Lawson, "Fair Trading Codes of Practice: the Legal Implications", (1977) 121 The Solicitors Journal 5; Cranston, op.cit., 61.

(23) See, for example, Lawson, Law of Sale and Hire Purchase in New Zealand (1973), 171 et seq, and the cases there cited involving attempts to evade the Hire Purchase and Credit Sales Stabilisation Regulations 1957.

(24) Cranston, op.cit., 61; Mitchell, 'Codes and the Consumer', (1976) Marketing 17.

(25) Generally, see Cranston, op.cit., 37-39.

aligned an equally extensive list of disadvantages. There are a number of factors that are common to many self regulatory systems that indicate self regulation is inferior to statutory control and may in fact work against the consumer interest.

Given that self regulatory codes of practice are often only introduced when there are threats of onerous governmental control there is at best a reluctant compliance that belies the supposed advantage of ready adherence to the spirit and letter of a code. Self regulation in this situation may have a positive economic benefit to those in the business as it may avert future costs by preventing more stringent government control and increase consumer confidence. Furthermore a self regulatory system may embody all the monopoly effects of licensing. As Page<sup>26</sup> comments

' ... (W)here the provision of goods or services or access to a facility is contingent upon membership of the group, it may be used to restrict access to the facility or group or to oppress the minority within it ... .'

For example, in *The Pharmaceutical Society of Great Britain v Dickson*<sup>27</sup> the Pharmaceutical Society passed a resolution, intended to be included in its code of ethics, to the effect that new pharmacies should be situated only on physically distinct premises and that trading activities of these new pharmacies in commodities

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(26) Loc. cit., 27.

(27) [1970] A.C 403.

other than medicines and pharmaceuticals should be controlled severely. The Society explained that this measure was designed to raise the status of the profession and to promote the main responsibility of selling pharmaceuticals. However the House of Lords held that the restrictions proposed amounted to a restraint in trade that was unreasonable in the circumstances. Not only would the proposed amendment to the code of ethics limit competition by restricting the number of pharmacies attached, for example, to department stores, but it would severely reduce the profitability of new entrants by inhibiting them from selling certain goods.

Perhaps the greatest drawback of self regulation, though, is that it often fails on enforcement and sanctions. A voluntary code of practice is only applicable 'to members of the association promoting the code, who choose to accept the standards, and to remain members'.<sup>28</sup> For one thing it is unlikely that a voluntary code of practice will attract universal allegiance throughout an industry, trade or profession. For example, the Committee of Advertising Practice has promulgated a code of practice that has a significant impact on some of the advertising excesses that prevailed in New Zealand.<sup>29</sup> Unfortunately the Committee has no control over direct mail solicitation or other distribution of brochures or circulars, nor are certain important journals represented on this Committee and bound by the code. Consequently

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(28) Marsh, op cit, 419.

(29) infra.

the utility and efficacy of a voluntary code will be restricted through membership of the association promulgating it. Moreover, as one writer<sup>30</sup> suggests '(r)ogue operators are much less likely to join trade associations than honest and experienced traders'.

Compounding the problem of ~~non~~-membership is the fact that associations of businessmen may be reluctant to take action against one of their fellows and are unlikely to allocate adequate resources to enforce codes.<sup>31</sup> Even if a self regulatory body decides to take action against one of the subscribers to their code, often that body will not have legal powers and it will be difficult to enforce the sanction. It is this problem that led the Securities Commission<sup>32</sup> to conclude that '(t)he main point arising from our study of self regulation ... is that it requires reinforcement by legal rules'. Of course, if an Association is sufficiently well known and respected by consumers the sanction of expulsion from the Association might amount to a sufficient incentive to abide by that Association's code of conduct or practice. Furthermore,

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(30) Harvey, The Law of Consumer Protection and Fair Trading (1978), 207.

(31) Cranston, op.cit., 63.

(32) Proposed Recommendations for Securities Regulations (1980), 12.4.4.

since earliest times<sup>33</sup> the principle that no man should be judge in his own cause has been recognised and yet herein lies the very 'stuff' of self regulation and its potential failure in terms of consumer protection. As long as the industry sits in its own courtroom, conducts its own prosecution and defence, observes in the jury box and ruminates on the Bench, the risk of vested interests dictating outcomes must remain.

Another big disadvantage of self regulation is that often advancing the consumer interest is diametrically opposed to business self-interest. Businessmen are unlikely to promote and support any form of regulation that impinges to large measure on profits, and many codes on closer examination most certainly do not promote the consumer interest. For example in the Motor Industry Code (UK), paragraph 3.11 states that:

'Under the Sale of Goods Act, if the buyer examines the goods before the contract is made, there is no condition of merchantable quality as regards defects which that examination ought to reveal. Dealers should therefore provide all reasonable facilities to enable prospective customers or their nominees to carry out an examination of the car prior to sale, in order that any defects which ought to be revealed at the time of sale are made known to both parties.' 34

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(33) See, for example, *Dr Bonham's* case (1610) 8 Co. Rep. 107a; 77 E.R. 638, 646.

(34) Cited in Marsh, op.cit., 420.

This rather transparent, and ineffective,<sup>35</sup> attempt to shelter behind the ruling in *Thornett & Fehr v Beer & Sons*<sup>36</sup> can by no stretch of the imagination be regarded as a provision designed in the consumer interest. Moreover, in some areas where it is socially desirable that industries restrict their activities in the consumer interest, self regulation must fail because business self-interest will prevail. For example, as two American commentators<sup>37</sup> put it

"Industrial self-regulation is not likely to emerge in the case of cigarettes. Tobacco companies are not going to commit corporate suicide . . . ."

Consequently, as a preliminary observation, one can say that there are areas where the consumer interest can be promoted by voluntary action on the part of various business, trade and professional associations, but the limitations inherent in systems of self regulation may necessitate legislative controls as well.

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(35) See Marsh, *idem*; see also *Frank v Grosvenor Motor Auctions (Pty) Ltd* [1960] V.R. 607, 609.

(36) [1919] 1 K.B. 486.

(37) Boyd and Claycamp, 'Industrial Self Regulation and the Public Interest', (1966) 64 Michigan Law Review 1239, 1253.

### 3. ADVERTISING CODES OF PRACTICE

One of the most important self regulatory bodies in New Zealand is the Committee of Advertising Practice (CAP) which was formed early in 1973. It consists of representatives from the Association of Accredited Advertising Agents of New Zealand Inc., the Independent Broadcasters Association, the Newspaper Publishers Association of New Zealand Inc., Radio New Zealand and Television New Zealand.

The Committee of Advertising Practice has established various codes of practice that control what can be said, and for some products (e.g. baldness treatment, slimming garments) effectively ban advertisements unless the advertiser can prove that he has something that really does work. In an introduction to the various particular codes the Committee expresses its two main objectives as follows:

- "(a) To seek to maintain at all times and in all media a proper and generally acceptable standard of advertising and to ensure that advertising is not misleading either by statement or by implication;
- (b) To encourage media voluntarily to co-operate in any self regulation that may be necessary from time to time."

Thereafter follow a number of particular codes relating to the marketing of cigarettes, driving advertising, financial advertising, liquor advertising, people in advertising, petrol consumption claims, advertising for slimming or weight loss and youth organisations in advertising.



For example, the code for the marketing of cigarettes indicates that its primary aims are to ensure that cigarette advertising will not be directed towards increasing the number of smokers<sup>38</sup> or towards young people.<sup>39</sup>

Furthermore, cigarette advertising is not to be conducted on television, radio or on the cinema screen and point of sale and newspaper advertising in this regard is restricted.<sup>40</sup> Health warnings are to be printed on each cigarette packet manufactured in New Zealand and each press and magazine advertisement for cigarettes shall carry the same warning notice.<sup>41</sup> An agreement has been reached between the Minister of Health and tobacco companies in New Zealand whereby the tobacco companies have agreed to abide by this Code and to be subject to the Committee of Advertising Practice's decisions in implementing it.<sup>42</sup>

The code relating to people in advertising declares, *inter alia*, that 'people should be portrayed in advertisements in realistic and intelligent terms'.<sup>43</sup>

The functioning of this self regulatory system erected by the Committee of Advertising Practice has been commented on by the Securities Commission<sup>44</sup> and by the Working Party who compiled the Martin Report.<sup>45</sup>

(38) Para. 2.1.

(39) Para. 2.2.

(40) Para. 3.1; 3.2; 3.3.

(41) Para. 5.1; 6.1.

(42) See *Consumer* 164, 222.

(43) Guideline no. 1.

(44) Proposed Recommendations for Securities Regulations (1980), 12.4.3.

(45) *Supra*.

The Securities Commission were impressed by the steps taken within the advertising industry itself to establish and maintain codes of responsible behaviour, but made a number of telling points concerning the system. *First*, that some important journals, like the New Zealand *Listener*, were not represented on the Committee and consequently the publishers of some of these journals would not feel constrained to adhere to the Code.<sup>46</sup> Furthermore, the Committee has no control over mailed advertising and in-store advertising and the Direct Mail Association is not a member of the Committee of Advertising Practice. As mentioned above, the efficacy of a voluntary code is dependent to a large measure on universal across-the-board membership of the association promoting it. Non-members cannot commit breaches of a code to which they do not subscribe. *Second*, the Commission pointed out that any scheme of self regulation runs the risk of becoming a form of censorship that could operate unfairly as between competing interests.<sup>47</sup> If the media is to sit in judgment on the acceptability or otherwise of certain advertisements and this assessment is to be made by reference to its own code of practice it is inevitable that the charge, if not the reality, of bias will raise its head; that is, it must be conceded that in a self regulatory scheme discriminatory practices may be pursued against certain members or non-members. *Third*, it noted that

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(46) Para. 12.4.3(a).

(47) Para. 12.4.3(d).

the Committee itself recognises that there is a need to back up the self regulation by legal sanctions; that is, in the context of financial advertising, a statutory body such as the Securities Commission should have 'a very broad and speedy power of injunction if advertising or promotional material promulgated by an organisation ignores self regulation in a manner which either deceives the public or puts it at risk'.<sup>48</sup> One of the major points to emerge from a recent study of advertising control in the United Kingdom<sup>49</sup> is the high percentage of advertisements that do not comply with the British Code of Advertising Practice, thus reinforcing the assertion that substantial legal sanctions are required. This need is clearly felt in New Zealand as well.<sup>50</sup>

The second recent appraisal of the Committee of Advertising Practice scheme is contained in the Martin Report.<sup>51</sup> This Report advocates the gradual consolidation

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(48) Para. 12.4.3(c).

(49) Review of the United Kingdom Self Regulatory System of Advertising Control - A Report by the Director-General of Fair Trading (November 1978).

(50) See for example: (1974) 4 Consumer Review 122; *Consumer* 114, 9; *Consumer* 115, 56; *Consumer* 117, 119; *Consumer* 120, 207; *Consumer* 130, 167; *Consumer* 145, 145; *Consumer* 149, 75; *Consumer* 154, 244; *Consumer* 157, 351; *Consumer* 158, 31; *Consumer* 163, 190; *Consumer* 191, 18. cf. *Consumer* 150, 114.

(51) Supra.

of domestic legislation affecting consumers,<sup>52</sup> beginning with the Consumer Information Act 1969, the Merchandise Marks Act 1954 and the Wool Labelling Act 1949, and also proposed incorporation of principles of the United Kingdom Trade Descriptions Act 1968 so as to extend the definitions of advertising and labelling, thus allowing greater control, and updating of provisions as to labelling and marking of goods, within one new Act, the Selling Practices Act.<sup>53</sup> However the main thrust of the proposals is that the new Act provides for the

"encouragement of fair trading practices through self regulation, with enforcement procedures relegated to a back-up role." 54

Thus, the proposals envisage a two-tier system, whereby most consumer problems would be resolved at the business, trade or professional association level. A second tier of enforcement procedures and penalties would come into play where amicable resolution at the first tier level

(52) See Chapter IV, Statutory Control of Advertising, infra.

(53) Recent newspaper reports indicate that any new legislation is likely to bear the title Trade Practices Act, rather than Selling Practices Act. See "The Press", 24 March 1981. Furthermore, there is some ambivalence as to whether any legislative changes should be modelled on the United Kingdom approach, as suggested in the Report, or whether the Australian approach should be preferred. See Chapter IV, infra.

(54) Martin Report, page 9.

failed. The Martin Report suggests that the Consumers' Institute, a statutory body,<sup>55</sup> but independent and non-governmental, be accorded the role of promoting the development of codes of fair practice since it is regularly in touch with both consumers and the dynamics of the market place. The Institute only would promote the drafting of codes, and offer advice and assistance - it would have no legal power to force associations to accept codes, exclude certain clauses, etc. However if a code was to be produced as a defence in any court action, the Martin Report proposes that the Institute could be called as a witness to give its opinion as to the fairness or otherwise of the Code. Moreover, it is envisaged that the courts should have regard to codes as indicators of what is normal industry practice.<sup>56</sup>

In relation to the advertising industry, in particular, the Martin Report 'heaps' praise on 'the highly successful operation of the Committee of Advertising Practice' and categorises these codes as being of 'great significance' and 'an excellent model for other self regulatory codes of fair practice'.<sup>57</sup> Furthermore the Committee of Advertising Practice system is hailed as 'so successful in eliminating the worst forms of misleading advertising that the Consumer Council has on occasions

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(55) Constituted under the authority of the Consumer Council Act 1966.

(56) See the Martin Report, pages 16, 18-21.

(57) Ibid, page 20.

expressed its unreserved satisfaction and approval'.<sup>58</sup>  
 Whether these high accolades are merited fall to be determined.

The Martin Report summarises the advantages of self regulation, in general, in the following terms:

"The proposal, advocating the promotion of codes of fair practice, provides distinct advantages for consumers, for traders, and for the Government:

For consumers

- (a) Less delay, expense and frustration in obtaining redress, and elimination of legal complexities.
- (b) The codes will be developed by traders in consultation with the Consumers' Institute, thus giving consumers a say in how fair practices are defined.

For traders

- (a) The marketplace will have a full say (and the major initiative) in setting the codes of practice.
- (b) Less cost and frustration, and the risk of damage to his reputation in Court action will be reduced.
- (c) Better relationships between consumers and traders.

For the Government

- (a) Avoid cost and involvement by Government departments.
- (b) Fewer disputes where the Government becomes the 'meat in the sandwich' between traders and consumers, or between trader and trader.
- (c) A flexible system providing smoother methods of reviewing and updating consumer legislation."

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(58) Idem.

(59) See the Report, page 11.

As regards these advantages the following observations are made. There are undoubted advantages for the consumer in facilitating redress without court proceedings. Legislative codes can only be enforced by court proceedings which can be costly and much more time consuming.

Whether codes eliminate legal complexities is debatable - as mentioned above, codes and legislation employ similar terminology and concepts to categorize prohibited statements and conduct with the result that problems of interpretation will be common to both. The 'advantage' of consumer participation in the formation of codes of fair practice is by no means unique to the scheme proposed in the Martin Report, and the Consumers' Institute actively advise and influence government as to the content of legislation; therefore the 'consumer voice' is no less evident in the legislative arena. The trader undoubtedly perceives advantages in a scheme that lessens the threat of court sanctions, and has a legitimate interest in an approach that reduces the risk of damage to his reputation in court. The proposals have obvious appeal to any government in times of economic stringency in that the role of government departments is played down. This, however, may be categorised as 'buck-passing' masquerading as benevolence; the responsibility of government departments is reduced in favour of the Consumers' Institute, an independent body with the consumers' interests at heart - but this body is powerless to force advertisers, for example, to include particular clauses in codes, to adopt codes, or to enforce them.

While some of these 'advantages' are open to doubt, a more remarkable feature of the Martin Report is that it, quite extraordinarily, omits to outline the negative features of the approach that it espouses.<sup>60</sup> Fundamental assumptions underlying the successful functioning of the proposed scheme are open to considerable doubt. For example, in the advertising context, the following observations may be advanced:

- (i) The assumption that the consumer knows about a code and his rights under it may be patently false. A feature of overseas codes has been their lack of publicity and the secrecy of complaint proceedings. Following criticism of this by the Office of Fair Trading and the government in the United Kingdom, a publicity campaign led to a significant increase in the number of complaints received by the Advertising Standards Association, which, as Cranston points out,<sup>61</sup> is particularly ironical because the Association had always trumpeted the smallness of the number of complaints as evidence that the self regulatory system was working satisfactorily. So extensive publicity is essential to a good code, and this is not in harmony with the cost saving advantages spelt out above.

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(60) Save for mention, at page 21, of the fact that not necessarily all members of a particular industry will subscribe to a voluntary code of conduct. The Martin Report records that "some types of advertisements are not directly controlled by the Committee of Advertising Practice because they do not appear in newspapers or magazines or on T.V. or radio. The most significant examples are letterbox leaflets and in-store advertisements ... ."

(61) Op. cit., 49.



- (ii) The assumption is made that the offending professional, business or tradesperson is covered by, or belongs to an association which adheres to a code of practice. As we have seen there are some notable 'non-subscribers' to the Committee of Advertising Practice Codes of Practice. There is no means to coerce such 'outsiders' into a self regulatory scheme.
- (iii) The success of such a scheme is dependent upon the goodwill of the members of a self regulatory body, and on consumer surveillance. Darvall<sup>62</sup> cites the following illustration:

"The National Safety Council of Australia lodged a complaint with the Advertising Standards Council concerning an advertisement for a circuit breaker. The illustration complained of in the advertisement portrayed a child plunging a knife into an electric toaster. The Safety Council claimed that it could encourage children to mimic the actions with fatal results. The complaint was upheld by the Advertising Standards Council and the advertiser was requested to amend its copy to eradicate the aspects of child mimicry. The amended advertisement portrayed a woman plunging a knife into a toaster."

Such an attitude reflects an absence of goodwill or sheer ignorance.

In the absence of adequate surveillance abuses will go undetected and consumers have an important role in this area as the Consumers' Institute,<sup>63</sup> with a staff of approximately sixty persons, cannot possibly monitor the market exclusively. However consumer surveillance may be less than

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(62) Loc.cit., 315.

(63) The Seventeenth Annual Report and Statement of Accounts, 31 December 1980, of the Consumer Council reports that the staff of the Institute was brought up to 60 in 1980. Staffing levels were as high as 78 in 1975.

satisfactory for a number of reasons; that is:

(a) ignorance of the relevant code and its provisions;  
 (b) unless a significant loss or failure to live up to expectations is involved the incentive to complain is absent; and, (c) certain claims are vague, subconscious and largely psychological and the consumer may not even perceive the claim, let alone contemplate complaining about it.<sup>64</sup> On the basis of the objections outlined earlier in this chapter,<sup>65</sup> and for the reasons just enumerated, this writer cannot muster the same enthusiasm for self regulation as reflected in the Martin Report.

However this is not to suggest that this writer does not recognise the undoubted usefulness of the Codes of Advertising Practice. Such non-recognition could be challenged by reference to numerous specific examples where the codes have operated effectively. Two such examples are as follows:

- (i) A Rotorua mail order business advertised over a number of years the availability of certain slimming garments and tablets.<sup>66</sup> Most of these advertisements

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(64) For example, an image advertisement may subtly promise the fulfilment of sexual or romantic imaginings if the consumer purchases a particular product. The advertisement may transgress code requirements as to ethics and taste, but consumer complaint is unlikely in such circumstances.

(65) See Part (2); Advantages and Disadvantages.

(66) See *Consumer* 145, 292.

contained misleading and untrue claims.<sup>67</sup> No action was taken under the Consumer Information Act 1969<sup>68</sup> but *Consumer*<sup>69</sup> asserts that 'since 1974 the Newspapers Publishers Association's disapproval of many of his ads (sic) has caused the volume to fall away to a comparative trickle'.<sup>70</sup> The adoption of the 'Code for Slimming or Weight Loss' has improved the position of the consumer in this area considerably. The Code recommends that the media should not accept advertisements which contain 'superlative, highly exaggerated or misleading claims' and 'full, authentic, and believable substantiation should be made before any claim is considered acceptable'. Furthermore the

(67) For example, an advertisement for 'trim jeans', a plastic garment, read as follows:

"The space age slenderiser ... you are ready for the most astounding experience in rapid slenderising you have ever known ... lose 10 pounds in 10 days ... ."

The Health Department reported that there was no scientific support whatsoever for the claims made for these garments.

(68) See Chapter IV, Statutory Control of Advertising, infra. No prosecution has ever been brought under this Act which contains extensive consultative procedures.

(69) Loc.cit., 296.

(70) The 'Code for Slimming or Weight Loss' was promulgated in August 1973; the advertisements *Consumer* refers to appeared in newspapers and magazines such as *Truth*, *Sunday Times*, *Sunday News* and *Woman's Weekly* during the period 1971 to 1977; note, that the fact that such advertisements were still appearing post-1973 reflects a weakness of voluntary codes of practice.

Code states, *inter alia*, that any claim as to specific weight loss should be regarded as unacceptable.

- (ii) A Leopard Breweries beer advertisement featuring Richard Hadlee contravened a section of the Code for Liquor Advertising in that a section of the Code provides that young people should not be encouraged to drink liquor by an 'identifiable hero'.<sup>71</sup> Following a complaint from an anti-liquor advertising campaigner, the Newspaper Publishers Association advised its member newspapers that the advertisement contravened the Code and recommended that it be rejected.<sup>72</sup> This recommendation was complied with by the various member newspapers.<sup>73</sup>

These illustrations serve to demonstrate the usefulness of the Codes of Advertising Practice and it is clear that such codes have an important place in any scheme of advertising regulation.

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(71) See "The Press", 15 December 1981.

(72) Idem.

(73) See "The Press", 19 December 1981. It is worth noting that Leopard Breweries (i) accused the Newspaper Publishers Association of double standards in that similar advertisements using the cricketer, Glenn Turner, and the golfer, Simon Owen, escaped criticism; and (ii) stated that if the newspaper ban continued, the campaign would turn to other methods - point-of-sale advertisements, hoardings, and magazines.

#### 4. OTHER CODES OF PRACTICE

Brief mention must also be made of some other codes of practice and ethics that have bearing on the issue of consumer information.

##### (1) NEW ZEALAND FINANCE HOUSES ASSOCIATION (INC) CODE OF ETHICS AND STANDARDS OF CONDUCT

The New Zealand Finance Houses Association (Inc) was founded in 1965 with the general objectives of acting to promote and protect the interests of member finance companies; to set and maintain high standards of ethical conduct and practice within the industry; to act as a public relations agency; and to negotiate with the Government and monetary authorities as representatives of the finance industry.<sup>74</sup> The Association comprises all of New Zealand's major finance companies<sup>75</sup> and this feature is an essential pre-requisite for effective self regulation.

In accordance with the objectives outlined above members have agreed to operate according to a Code of Ethics. Of particular significance to the consumer are paragraphs 3 and 5 of this Code. Paragraph 3 reads:

'Members will explain fully to customers the cost, terms and contractual obligations of credit transactions. Written documents will be as simple, lucid and unambiguous as circumstances will permit. A member shall at all times act honestly and in such manner that customers are not misled.'

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(74) See, for example, NZ Finance Houses Association (Inc) Annual Report and Review of Activities 1979/1980.

(75) That is; AA Finance Ltd; Australian Guarantee Corporation Ltd; Beneficial Finance Ltd; Broadlands Finance Ltd; Finance and Discounts Ltd; General Finance Ltd; Lombard (NZ) Ltd; Marac Finance Ltd; NZI Finance Ltd; UDC Finance Ltd (as at 31 May 1981). Source: Annual Report and Review of Activities 1980/1981.

and paragraph 5 states that:

"Members will discourage commitments by borrowers in excess of their financial resources."

As regards paragraph 3 the requirement of clarity in documentation is an example of a practice that is exceptionally difficult to cover by the precise wording appropriate for legal regulation,<sup>76</sup> and the paternalism inherent in paragraph 5 is nevertheless welcome. From the point of view of enforcement paragraph 13 provides that disciplinary action may be taken against any member found to be in breach of the code.<sup>77</sup> The fact that no action has yet been taken against any member<sup>78</sup> suggests either salutary adherence to the code or inadequate allocation of resources to the enforcement of its provisions. If the latter be the case, it would be unfortunate for the consumer if the code were allowed to descend to the level of mere window dressing and amount to no more than a public relations feature.<sup>79</sup> However it is probably true to say that some of the worst abuses in the finance industry are perpetrated by firms who do not belong to this voluntary association.<sup>80</sup> This again highlights one of the deficiencies in self regulatory codes of practice.

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(76) Borrie, 'Laws and Codes for Consumers', (1980) *Journal of Business Law* 315, 322. The Credit Contracts Act 1981 obviously provides for the mandatory disclosure of the cost of credit and terms of the contract, but the intelligibility or otherwise of the disclosed information is, to a large extent, dependent upon the goodwill of the financier.

(77) Disciplinary provisions empower the Disciplinary Committee of the Association to censure or expel a member.

(78) Letter dated 4 December 1980 from K.W. Baker, assistant secretary of the Association.

(79) See the Association's Annual Report and Review of Activities 1978/1979, page 11.

(80) See *Consumer* 192, 51, and the report relating to the activities of Burberry Finance Ltd which is based in Christchurch, but has branches in five other South Island centres.

(2) PHARMACEUTICAL SOCIETY'S CODE OF ETHICS

The Pharmaceutical Society of New Zealand has the responsibility, *inter alia*, to promote and encourage proper conduct among pharmacists and to combat objectionable practices.<sup>81</sup> Pursuant to these obligations and in accordance with its rule making powers<sup>82</sup> the Society recently<sup>83</sup> prescribed a Code of Ethics. The preamble to this Code records that

"The Code of Ethics has been prepared to enable pharmacists to ensure that their professional work is of the highest standard and is seen to be so by the public."

The Code specifies a pharmacist's obligations with respect to the profession, the public, fellow pharmacists, and to medical practitioners in a comprehensive manner. For example, in relation to the profession, all advertising pertaining to a pharmacy must be 'dignified, restrained and such as to uphold the dignity of the profession' and the 'sale of contraceptives shall not be advertised directly'.<sup>84</sup> In relation to the public, a pharmacist is obliged to maintain a service adequate to the needs of the community that he serves, must closely supervise the carrying out of any act that he delegates, and must refrain from supplying anything which he knows or should reasonably be

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(81) Pharmacy Act 1970, s 3(2).

(82) ibid, s 12(c).

(83) 20 February 1980.

(84) Para. 2.

expected to realise is likely to be misused, for example.<sup>85</sup> The requirement that an adequate service be maintained with reference to the community in which a pharmacist operates is an illustration of the valuable flexibility inherent in self regulation.

Powerful sanctions exist to secure compliance with this Code in that a pharmacist who has been guilty of professional misconduct<sup>86</sup> or who has wilfully disobeyed a provision of the Code,<sup>87</sup> may be fined, censured, suspended for up to three years or even deregistered.<sup>88</sup> Furthermore the person concerned may be ordered to pay any costs and expenses of, and incidental to, the inquiry.<sup>89</sup> Needless to say, the potential for rigorous enforcement favourably distinguishes this code from other voluntary codes of practice, but it is to be observed that legislative backing gives the code its 'teeth'.

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(85) Para. 3.

(86) Pharmacy Act 1970, s 30(1)(b).

(87) Ibid, s 30(1)(f).

(88) Ibid, s 31.

(89) Ibid, s 31(2)(e).



(3) TRAVEL AGENTS

An interesting example of business self regulation in New Zealand is the travel industry.<sup>90</sup> There are a number of autonomous, but inter-related, bodies active in this area.

*First*, there is the New Zealand Institute of Travel (NZIT) which is a professional body formed in 1968 with the object of promoting the educational and cultural advancement of those working in the travel industry. It encourages and assists travel agents to attain the Government examination qualification called the New Zealand Certificate in Commerce by developing a course in conjunction with the New Zealand Technicians Certification Authority which includes some commercial subjects and some that relate purely to the travel industry.<sup>91</sup> The NZIT also works with the Aviation and Tourism Industry Training Board which, since its inception in 1975, has been recognised as the training and education authority for the travel and tourism industry in this country. These measures are of immense indirect benefit to the consumer in that they promote competence and professionalism within the industry.

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(90) Contrast the position in New South Wales where the Travel Agents Act 1973 sets up a detailed licensing scheme for travel agents. See Goldring and Maher, Consumer Protection Law in Australia (1979), 614-642.

(91) See the Rules and Constitution of the New Zealand Institute of Travel.

*Second*, the Travel Agents Association of New Zealand (TAANZ) comprises persons and corporations that sell travel and facilities of travel to the public. The avowed objects of this organisation include promoting the interests of members, stimulating the desire to travel and ensuring that proper ethical standards are maintained. There are a number of criteria for membership; viz., the member must be able to provide a bond of \$20,000, the agency must have a minimum capital of \$5,000, must have suitable premises solely devoted to the operation of an agency, and the applicant must have satisfactory references from two other TAANZ agents and two accountants, bank managers or solicitors. The bond monies are held as security to pay for any defaults by the member; for example, through a failure by the agent to pay for travel accommodation, air fares, etc, with money handed over by a customer. The TAANZ has also arranged for an umbrella bond with an insurance company to provide additional blanket cover if the individual member's cover of \$20,000 has been exhausted. For this reason *Consumer*<sup>92</sup> suggest that

"... if you are dealing with a travel agency make sure it is bonded with the TAANZ. This should give the traveller some cover in the event of the agency suddenly going out of business... ."

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(92) *Consumer* 193, 85.

The TAANZ also have a detailed code of practice and ethics which endeavours to ensure, *inter alia*, that all statements and information conveyed by members shall be responsible and accurate.<sup>93</sup> While a travel agent need not be a member of TAANZ the business advantages of membership<sup>94</sup> make things very difficult for outsiders.

(4) GENERAL

Other codes that merit brief mention are as follows:

(i) The Direct Selling Association Code of Ethics which stipulates, among other things, that sales representatives must clearly identify themselves and their company<sup>95</sup>; that

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(93) See the TAANZ Directory and Information Guide, and Constitution and Rules. Note, that the Association of British Travel Agents has a voluntary code of conduct which is much more extensive in its scope. See Cranston, *op cit*, 31; Harvey, *op cit*, 209.

(94) For example, TAANZ has an agreement that facilitates transactions between its members and the Motel Association of New Zealand; furthermore, the New Zealand Accommodation Council, a body comprising hotel proprietors and others engaged in the accommodation business, operates an accreditation scheme whereby financially sound travel agents may be accredited; accreditation makes booking of accommodation easier in the sense that credit will be extended by the hotelier to the agent; membership of TAANZ virtually ensures accreditation.

(95) See *Consumer* 192, 37. Electrolux agents carry identification cards bearing a photograph of the agent.

the consumer must be given the full name and address of the company so that it can be readily contacted<sup>96</sup>; that a written guarantee must be given on all products; and that customer complaints must be dealt with 'fully and fairly'.<sup>97</sup>

(ii) The Footwear Industry Code, and a Code on care labelling drafted by the garment and textile industry, is designed to improve consumer information as regards these products.<sup>98</sup>

(iii) Numerous other organisations, ranging from the New Zealand Bankers Association and the Real Estate Institute of New Zealand<sup>99</sup> to the unlikely extreme of the Pest Control Association of New Zealand (Inc),<sup>100</sup> have set up self regulatory schemes designed to ensure certain standards of ethics and skill amongst members for the protection of members and consumers generally.

## 5. CONCLUSION

*First*, self-regulation must be backed up by adequate legal controls for the simple reason that not all businessmen

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(96) By virtue of the Door to Door Sales Act 1967, s 6, such disclosure is mandatory where the representative effects a transaction that is subject to the Act. See Chapter V, Disclosure of Information, infra.

(97) Generally, see du Fresne, "Both Feet in the Door", The Listener, 5 January 1980.

(98) See the Martin Report at page 20.

(99) See "The Press", 24 June 1981.

(100) See *Consumer* 165, 250.

will choose to belong to a particular association or group that promotes self-regulation and endorses a code of ethical practice. Furthermore, not all members of such associations or groups will adhere to the self-regulatory provisions and effective legal sanctions will support compliance with codes of conduct.

*Second*, there is little doubt that self-regulatory schemes have an important role in the regulation of advertising and the disclosure of information. However, two specific observations are made regarding the Committee of Advertising Practice Codes and their implementation:

(i) The implementation of the codes rests exclusively in the hands of the advertising industry. The presence of consumer representatives on the Committee might beneficially affect the approach of that Committee to advertising problems and dispel the argument that industry representatives have 'a limited view of what is against the consumer interest and should be curtailed'.<sup>101</sup> In order that the codes of practice be independently enforced the Committee might well follow its British counterpart and establish an Advertising Standards Authority staffed by a substantial number of persons from outside the industry.<sup>102</sup>

(ii) The codes of practice thus far promulgated do not cover

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(101) Cranston, op.cit., 63

(102) The British Advertising Association has established an Advertising Standards Authority, a company limited by guarantee, to supervise the advertising code. The chairperson is an individual from outside the industry and approximately half its members must be from outside the industry.

the whole spectrum of advertisements. No doubt, codes have been promulgated for those areas where abuses have been most apparent, but the absence of a general code applicable across the board is a lacuna that is easily remedied.

*Third*, the proposal that the Consumers' Institute be entrusted with the task of promoting codes of practice in many more businesses and industries in New Zealand has its attractions,<sup>103</sup> as does the suggestion that this same body be responsible for monitoring codes of practice.<sup>104</sup> However, it is submitted that more extensive power should be accorded to a 'watchdog' body, namely, the power to formally approve a code and to compel a trade group to include certain clauses or exclude restrictive clauses. This, it is recognised, goes beyond self regulation into the field of statutory control but it is suggested that this will prevent codes of practice or ethics from amounting to mere window dressing for the exclusive benefit of the promulgating members. Such a body should also have full investigative powers in order to effectively monitor compliance, or otherwise.<sup>105</sup>

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(103) See the Martin Report, at page 21.

(104) *Idem*.

(105) It is recommended that this 'body' be a Consumer Affairs Department; see Chapter VI, Conclusion, *infra*. This is not to suggest that the Consumers' Institute are not admirably positioned to fulfil this function, but a positive directory role is irreconcilable with the impartial and vitally important role that this organisation currently performs.

*Fourth*, codes of practice provide a useful yardstick against which the courts may measure parties behaviour. For example, where an allegedly deceptive advertisement was the subject of litigation, the court could refer to a relevant code of advertising practice as an indicative test of what is normal industry practice.<sup>106</sup>

*Finally*, while business self regulation represents a potentially effective way to promote the consumer interest in some areas, care must be exercised lest the advocacy of self-regulation clouds its limitations. As the Director General of Fair Trading in the United Kingdom, Professor Gordon Borrie asserts:

"There must.....be caution over proposals that would mean codes becoming in part a substitute for law rather than a supplement to law....."<sup>107</sup>

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(106) See Page, op.cit., 31.

(107) "Laws and Codes for Consumers," (1980) Journal of Business Law 315, 325.

### III PRIVATE LAW REMEDIES

Much of the law relating to advertising, and the disclosure of information generally, is the creature of statute with emphasis being placed on public regulation.<sup>1</sup> However, remedies developed at common law and modified by statute exhibit a reasonable potential for the control of misleading or false advertising/information relating to goods, services and associated credit and it would be a mistake to consider such control to lie exclusively within the domain of public law. In this part, therefore, it is proposed to consider the nature of the consumers' rights of redress against an advertiser. It must be born in mind that the primary concern here is with advertising and the provision of information with the result that little consideration will be given to the terms and conditions implied into contracts for the sale of goods<sup>2</sup> or supply of services,<sup>3</sup> nor to the extensive body of law relating to tortious liability arising out of the sale or supply of defective goods or services.

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- (1) See Chapter IV, Statutory Control of Advertising, infra. Even with the shift away from *caveat emptor* to *caveat venditor* (see Diplock LJ in *Ashington Piggeries v Christopher Hill Ltd* [1972] 2 AC 441) the common law in its development to protect the consumer has concentrated more on the goods and services themselves than on the advertisements used to promote their sale.
  - (2) See the Sale of Goods Act 1908, ss 15, 16; the Hire Purchase Act 1971, ss 12, 13, 14.
  - (3) See, for example, *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454.



# 1. CONTRACTUAL REMEDIES

## (1) ADVERTISEMENTS, OFFERS, AND TERMS OF THE CONTRACT.

The seller or supplier of goods or services may indicate the availability of those goods or services for sale or supply by means of advertising, the publication of catalogues or by displaying the goods on his premises. The general rule concerning these advertisements or displays is that they do not constitute offers and the seller is not bound to sell the articles thus advertised or displayed. In these situations the law regards the seller as making an 'invitation to treat', that is, an attempt to call attention to goods that he has for sale and the prices he expects. Thus in *Grainger & Son v Gough*<sup>4</sup> it was held that a wine merchant who distributed a catalogue of wines was not making an offer to sell the wines advertised, but merely inviting offers to purchase. Lord Herschell said:

"The transmission of such a price list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be unable to carry out, his stock of wine of that description being necessarily limited."<sup>5</sup>

Similarly, in *Crawley v R*<sup>6</sup> a shopkeeper advertised the

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(4) [1896] AC 325.

(5) Ibid, at 334.

(6) 1909 TS 1105.

sale of a particular brand of tobacco at a cheap price by placing a placard outside his shop. In reliance upon this advertisement a customer entered the shop, asked for a pound of tobacco, and was supplied with it. However, when he returned five minutes later asking for a further pound the shopkeeper refused to supply it, presumably because his stock was low and he wished to supply as many new customers as possible. It was held that there was no contract to supply the tobacco. Smith J held that:

"There mere fact that a tradesman advertises the price at which he sells goods does not appear to me to be an offer to any member of the public to enter the shop and purchase goods, nor do I think that a contract is constituted when any member of the public comes in and tenders the price mentioned in the advertisement. It would lead to most extraordinary results if that were the correct view of the case. Because then, supposing a shopkeeper were sold out of a particular class of goods, thousands of members of the public might crowd into the shop and demand to be served, and each one would have a right of action against the proprietor for not performing his contract. I do not think those consequences follow from the mere advertisement of the price at which a tradesman sells his goods. It seems to me to amount simply to an announcement of his intention to sell at the price that he advertises." 7

The same reasoning was applied to an advertisement offering bramblefinch cocks and hens for sale,<sup>8</sup> and it is clear that the display of goods, with or without a price

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(7) Ibid, at 1108.

(8) See *Partridge v Crittenden* [1968] 1 WLR 1204.

tag, does not amount to an offer, whether the display is in a shop window<sup>9</sup> or on the shelves of a self-service store.<sup>10</sup> In such cases it is the consumer who makes the offer to purchase which, of course, the seller may accept or reject.

Various arguments are adduced in support of this common law approach of categorising much advertising and displays as merely constituting invitations to treat. The main argument is that outlined by Lord Herschell above; that is, that any other approach would mean that a seller would be bound in contracts to all sorts of persons after his stocks have run out. A simple answer to this problem would be to imply into "offers" a term to the effect that 'first come, first served' prevails, and when stocks run out there will be no offer open to acceptance.<sup>11</sup> A second rationale for the common law approach is given by Winfield<sup>12</sup> who argues:

"A shop is a place for bargaining, not for compulsory sales. Presumptively, the importance of the personality of the customer cannot be eliminated. If the display of such goods were an offer, then the shop-keeper might be forced to contract with his worst enemy, his greatest trade rival, a reeling drunkard, or a ragged and verminous tramp."

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(9) *Timothy v Simpson* (1834) 6 C & P 499;  
*Fisher v Bell* [1961] 1 QB 394.

(10) *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* [1952] 2 QB 795.

(11) See Winfield, 'Some Aspects of Offer and Acceptance', (1939) 55 LQR 499, 517-518; Kahn, 'Some Mysteries of Offer and Acceptance', (1955) 72 South African Law Journal 246, 251.

(12) *Ibid*, 518.

The answer, however, may lie in the fact that a term can be implied into the offer, as in Dutch law,<sup>13</sup> excluding such people. A third significant argument in favour of the rule in *Gough's* case<sup>14</sup> is that the consumer should not get the advantage of 'price-ticket muddling', but in rebuttal it may be asserted that a seller should organise his business so that this does not occur.<sup>15</sup>

The above three reasons all seem to have satisfactory counter-arguments in support of the view that the shop-keeper should be regarded as the person who made the offer. Furthermore, given that an overwhelming proportion of shops operate on a self-service basis today, the old rationale that shops are a place for "bargaining" has a somewhat hollow ring. It can be contended with some force that prospective customers' interests require that they should not be lured into shops which do not intend to do business on the advertised basis.

However, while the common law does exhibit a marked reluctance to regard advertisements or displays as offers,<sup>16</sup> it is possible in appropriate circumstances for

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(13) See Kahn, Contract and Mercantile Law Through the Cases (1971), 20.

(14) Supra.

(15) In any event, relief may be granted in such circumstances pursuant to the Contractual Mistakes Act 1977, s 7.

(16) See, further: *R v Dawood* (1976) 27 Canadian Criminal Cases (2d) 300 (the offer in a supermarket sale was held to be made by the customer at the check out counter); *Harris v Nickerson* (1873) LR 8 QB 286 (advertisement that an auction sale will be held is not an offer to a person who comes to bid); *Rooke v Dawson* [1895] 1 Ch 480 (advertisement that a scholarship examination will be held is not an offer to a candidate); *Montgomery Ward & Co v Johnson* 95 NE 290 (1911); *O'Keefe v Lee Callan Imports Inc* 262 NE (2d) 758; *Ehrlich v Willis Music Co* 113 NE (2d) 252.

an advertisement or display of goods with price ticket attached to constitute a valid offer provided the advertiser intended his advertisement to have that effect. The test whereby this intention is measured is an objective one and a 'deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability',<sup>17</sup> if the language used would be construed by a reasonable person as conveying an intention to create legal relations.<sup>18</sup> The *locus classicus* in this area is *Carlill v Carbolic Smoke Ball Co.*<sup>19</sup> In 1892, a company which manufactured a medical preparation called the Carbolic Smoke Ball inserted the following advertisement in the *Pall Mall Gazette*

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease by taking cold, after having used the Ball three times daily for two weeks according to the printed directions supplied with each Ball. £100 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter."

On the strength of the advertisement, Mrs Carlill bought the Ball and used it as directed. After more than the required fortnight of use she contracted influenza and so claimed the £100 reward. In an action by Carlill to recover the reward, the Court distinguished the case from the ordinary general rule for advertisements as stated above, and holding that there was a contract, gave

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(17) Williston on Contracts (3 ed), s 21.

(18) See Cheshire and Fifoot, The Law of Contract (5 NZ ed, 1979), 94.

(19) [1893] 1 QB 256.

judgement for Carlill. The Court held that the defendant company obviously had intended their advertisement to constitute a valid offer because of the express statement in the advertisement that money had been deposited as evidence of their sincerity. Furthermore, as Bowen LJ said:

"... if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification." 20

Similarly, in *Grant v Province of New Brunswick*<sup>21</sup> the province publicized a programme whereby they promised to purchase surplus potatoes at a support price and to make payments direct to the grower. The plaintiff's consignment of potatoes was rejected by the province and the plaintiff sued for the price. The Appeal Division of the New Brunswick Supreme Court held that a reasonable person in the position of the plaintiff would have been entitled to assume that if he complied with various conditions outlined in the programme he was entitled to sell the potatoes to the province and that the province was legally bound to purchase and pay for them. The Court held, therefore, that the announcement constituted an offer to all eligible persons and that the province was contractually bound to any person who accepted the offer by complying with conditions specified.

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(20) *Ibid*, 269.

(21) (1973) 35 DLR (3d) 141.

Both these illustrations are of unilateral contracts and as one learned writer<sup>22</sup> points out

"... there undoubtedly lies behind these cases the notion that the defendant, having for his business purposes induced the plaintiff's reliance, should pay compensation. ... (U)nilateral contracts have provided a useful technique for protective reliance under cover of a bargain." 23

However, advertisements for bilateral contracts are not often categorised as constituting offers, and, although the decision in *Carlill's* case has been described as 'the red light over the desk of the advertising copy-writer',<sup>24</sup> there is no indication of a general tendency by the courts to regard advertisements and other displays as constituting offers, as opposed to invitations to treat.

Where does this leave the consumer? If the advertisement etc is categorised as an invitation to treat it usually will be the consumer who makes the offer which the seller may reject or accept. If the offer is accepted then the terms of the ensuing contract will be found in the direct exchanges between the parties which may or may not encompass the terms as reflected in the advertisement which acted as a catalyst to bring about the transaction.

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(22) Waddams, The Law of Contracts (1977).

(23) Ibid, at 111-112. Further illustrations of advertisements of unilateral contracts where the advertisement has been categorised as an offer include: *Wood v L  ktrik Ltd* 'The Times', 13 January 1932 (cited in Lawson, Advertising Law (1978), 7); *Goldthorpe v Logan* (1943) 2 DLR 519; *McMahon v Gilberd & Co Ltd* [1955] NZLR 1206.

(24) Turner, The Shocking History of Advertising (1965), 97.

However, in the absence of proof to the contrary, the offer that the consumer makes will be in terms of the invitation to treat, or advertisement. As Lord Goddard CJ observed in *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd*<sup>25</sup> 'the ordinary principles of commonsense and of commerce must be applied in this matter', and where the consumer merely presents the goods to the seller, without more, the terms of the offer must be to purchase in terms of the invitation. This approach is greatly facilitated in respect of contracts for the sale of goods by description in that the Sale of Goods Act 1908<sup>26</sup> and the Hire Purchase Act 1971<sup>27</sup> imply terms to the effect that the relevant product must correspond with the description. The phrase 'sale by description' has been interpreted very widely, and in *Grant v Australian Knitting Mills Ltd*<sup>28</sup> Lord Wright stated that:

"... a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing, but as a thing corresponding to a description." 29

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(25) *Supra*, at 802; see also *Turner v Anquetil* [1953] NZLR 952 for an example of the terms of an advertisement being carried forward into a contract.

(26) S 15.

(27) S 14(2).

(28) [1936] AC 85.

(29) *Ibid*, at 100; see also *Taylor v Combined Buyers* [1924] NZLR 627, 633; *Godley & Perry* [1960] 1 WLR 9, 14; *Finch Motors Ltd v Quin (No. 2)* [1980] 2 NZLR 519.



In appropriate circumstances, the descriptive terms of the advertisement may be taken to be part of the contract description with the result that in contracts for the sale of goods there is an implied condition to the effect that the product complies with the description given in the advertisement, and in hire purchase agreements there is an implied term to this effect. For example, in *Beale v Taylor*<sup>30</sup> a private individual advertised his motor vehicle for sale, describing it as a 'Herald Convertible, white, 1961, twin carbs'. Unknown to either party the car was in fact the rear half of a 1961 Herald and the front half of an earlier model, and the seller was not regarded as being careless in not knowing this. The buyer, upon ascertaining this hermaphrodite quality, sought damages for breach of the implied condition as to description. In holding that he was so entitled Sellers LJ observed that:

"... the buyer, when he came along to see this car, was coming along to see a car as advertised, that is, a car described as a 'Herald convertible, white, 1961'. When he came along he saw what ostensibly was a Herald convertible, white, 1961 ... it was on this basis that he was making the offer and in the belief that the seller was advancing his car as that which his advertisement indicated." 31

There are limitations to this approach, however, in that not every statement as to the attributes of a product form part of the contractual description and a distinction

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(30) [1967] 3 All ER 253.

(31) *Ibid*, at 255.

is drawn between the statements relating to the quality of goods, and statements which are descriptive of the goods in the sense that they identify them.<sup>32</sup> Generally, it is only the latter category of statements which form part of the contract description, although the dividing line may be very fine at times.<sup>33</sup>

Where the advertisement amounts to an offer which is duly accepted by the consumer, the consumer has an action for breach of contract where the product or service does not measure up to the advertised expectations.<sup>34</sup> Similarly, where the advertisement amounts to no more than an invitation to treat, the consumer may exercise his right to cancel, or alternatively, his right to claim damages, in respect of any term of that invitation that is incorporated into the ensuing contract and that is broken.<sup>35</sup> Consequently, the common law affords the consumer some measure of protection where the consumer enters into a contract with the advertiser in reliance upon an advertisement, whether that advertisement amounts to an offer or merely to an invitation to treat.

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(32) See *Taylor v Combined Buyers Ltd*, supra, 639-641; *Ashington Piggeries v Christopher Hill Ltd*, supra; *Finch Motors Ltd v Quin*, supra.

(33) See *Armaghdown Motors Ltd v Gray Motors Ltd* [1963] NZLR 5; *Finch Motors Ltd v Quin*, supra; *Cotter v Luckie* [1918] NZLR 811; *Dell v Quilty* [1924] NZLR 1270.

(34) Of course, not all claims made in advertisements have legal effect in that certain claims may amount to no more than "puffery"; see infra.

(35) See the Contractual Remedies Act 1979, ss 7, 10; discussed infra.

(2) MISREPRESENTATION

Outside the four corners of any contract, a false or misleading advertisement may render the advertiser liable in damages and/or entitle the consumer to cancel the contract that he entered into in reliance upon the advertisement. The position in New Zealand as between parties to a contract is succinctly stated in the Contractual Remedies Act 1979. Section 6 of the Act provides as follows:

"6.Damages for misrepresentation-(1)If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract-

- (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
- (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.

(2)Notwithstanding anything in section 56 or section 60(2) of the Sale of Goods Act 1908, but subject to section 5 of this Act, subsection (1) of this section shall apply to contracts for the sale of goods."

Furthermore, a contracting party is entitled to cancel a contract<sup>36</sup> where it has been induced by a misrepresentation but only if the parties have expressly or impliedly

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(36) Generally, see the Contractual Remedies Act 1979, s 7.

agreed that the truth of the representation is "essential" to the representee,<sup>37</sup> or it is shown that the misrepresentation has a profound effect upon the benefit or the burden of the contract.<sup>38</sup>

This statute effected significant changes to the law in a number of ways, in that:

(i) At common law, a consumer who was induced to enter into a contract due to the fraudulent misrepresentation of the seller could rescind the contract<sup>39</sup> and/or institute an action in the tort of deceit for damages.<sup>40</sup> Section 6 of the Contractual Remedies Act 1979 abolishes the action for pre-contract fraudulent misrepresentation and provides that it is no longer possible to bring tort actions.

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(37) Contractual Remedies Act 1979, s 7(4)(a).

(38) *Ibid*, s 7(4)(b). This provision entitles a contracting party to cancel where the effect of the misrepresentation will be -

" (i) Substantially to reduce the benefit of the contract to the cancelling party; or  
 (ii) Substantially to increase the burden of the cancelling party under the contract; or  
 (iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for."

cf. *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 70.

(39) See Cheshire and Fifoot, *op. cit.*, 241.

(40) See *Derry v Peek* (1889) 14 AC 337; *Richardson v Silver* (1873) LR 9 QB 34. The representee had to prove that the representor knew that the statement was false, or had no belief in its truth, or made it recklessly, not caring whether it was true or false.

(ii) At common law, if the misrepresentation was innocent or negligent the remedy of rescission was initially the only remedy available.<sup>41</sup> However, by virtue of the decisions of the House of Lords in *Hedley Byrne & Co v Heller & Partners Ltd*<sup>42</sup> an action in damages in the tort of negligence could lie where the representation was made negligently. However, in respect of innocent misrepresentations the representee was "faced with a 'take it or leave it' choice of proceeding with the contract uncompensated or taking the drastic step of rescinding".<sup>43</sup> The Contractual Remedies Act 1979 abolishes the action for pre-contract negligent misrepresentation, eliminates the possibility of bringing a tort action, and makes it possible to claim damages in respect of an innocent misrepresentation.<sup>44</sup>

As Dawson and McLauchlan<sup>45</sup> explain:

"The philosophy behind [section 6] is that where a person has made a representation which induces another to contract with him, he should be responsible for the accuracy of the representation irrespective of fault."

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(41) See *Whittington v Seale-Hayne* (1900) 82 LT 49.

(42) [1964] AC 465; see also, *Esso Petroleum Co v Mardon* [1976] 2 All ER 5; *Sealand of the Pacific v Ocean Cement Ltd* (1973) 33 DLR (3d) 625; *Capital Motors Ltd v Beecham* [1975] 1 NZLR 576.

(43) Dawson and McLauchlan, *The Contractual Remedies Act 1979* (1981), 12; note, that following *Riddiford v Warren* (1901) 20 NZLR 572 an innocent misrepresentation not a term of the contract, did not enable the person to whom it was made to rescind the contract if the contract was one for the sale of goods.

(44) S 6.

(45) *Op. cit.*, 12.

An actionable misrepresentation *per se* gives a right to damages and these damages are assessed "as if the representation were a term of the contract that has been broken".<sup>46</sup>

(iii) While the right to terminate the contract where it has been induced by misrepresentation is retained, this right is severely restricted. At common law the right to rescind did not depend on a finding that the misrepresentation complained of related to a matter of fundamental importance or had serious consequences.<sup>47</sup>

(iv) Cancellation differs from rescission in that it operates *de futuro* only; at common law a party was entitled to rescind the contract *ab initio* and seek restitution of benefits conferred; under the Contractual Remedies Act a wide discretion is arrogated to the Court in terms of restoration of benefits, and cancellation does not automatically result in certain consequences such as recovery of monies paid over or property transferred pursuant to the contract.<sup>48</sup>

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(46) S 6(1)(a): For the difference between the contractual measure of damages, as espoused by section 6(1)(a), and the tortious measure, see: McGregor, *Damages* (13 ed, 1972), para 1357; Dawson and McLauchlan, *op. cit.*, 26 *et seq.*

(47) Dawson and McLauchlan, *op. cit.*, 45. These writers point out, however, that 'Where the misrepresentation was very trivial, the representee could be denied rescission on the ground that the representation was immaterial, i.e., it did not induce the contract'.

(48) Contractual Remedies Act 1979, s 9; *Giles v Edwards* (1797) 7 TR 181; *Le Seur v Morang & Co Ltd* (1910) 20 OR 594.

As against this brief background sketch, I turn now to a consideration of the position of the consumer *vis-a-vis* advertisements and other communications relating to goods, services and associated credit.

(a) The remedy of damages.

Before the consumer can recover damages pursuant to section 6 of the Contractual Remedies Act 1979 he must establish: (i) that there was a misrepresentation; (ii) made 'by or on behalf of another party' to the contract, and; (iii) that the misrepresentation induced entry into the contract.<sup>49</sup>

Re (i) Misrepresentation

The term 'misrepresentation' is not defined in the Act with the result that reference must be made to the common law where the term has been defined as a 'false statement of existing or past fact'.<sup>50</sup> When the advertisement or other communication makes an *objective* statement of fact which is demonstrably false it is not difficult to establish an actionable misrepresentation. For example, consider the following cases:

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(49) This "breakdown" is adopted from Dawson and McLauchlan, op. cit., 13-14.

(50) See Contracts and Commercial Law Reform Committee, Misrepresentation and Breach of Contract (1967), para 13.3; see also Cheshire and Fifoot, op. cit., 242 *et seq.* A detailed analysis of the meaning of misrepresentation is outside the scope of this dissertation; but, see also, the discussion, infra at 164, regarding incomplete statements and the proposition that suppressio veri may amount to suggestio falsi.

In *Capital Motors Ltd v Beecham*<sup>51</sup> the plaintiff purchased a car from the defendant motor vehicle dealer in reliance on a salesman's negligent misrepresentation that the car had not had more than two previous owners. In fact, the vehicle had had five previous owners and the plaintiff recovered damages in tort for this negligent misrepresentation. Similarly in *Cload v Ferguson*<sup>52</sup> an auctioneer published in a daily newspaper a long list of household goods to be auctioned by him at a specified time and place. Included in the list was the following:

"A very lovely modern miniature piano, in Sheraton design in mahogany with practiano and bench to match (this is a modern piano costing \$1000 today)."

In fact the piano was worth much less than \$1000 new and the piano had been purchased for \$698 by the auctioneer's principal. Consequently the court had no hesitation in holding that there had been an actionable misrepresentation. Finally reference could be made to *Jarvis v Swan Tours Ltd*<sup>53</sup> where a consumer was awarded damages for the disappointment, upset and frustration he experienced when he discovered - contrary to statements in a brochure about his Swiss skiing trip - that there was no welcoming party, that on several evenings that the bar was not open, that the skiing was some distance away, that there were no full-length skis or house party arrangements, that a

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(51) [1975] 1 NZLR 576.

(52) [1953] 10 WWR (NS) 426.

(53) [1973] 1 QB 235.



suitable yodler did not appear and that he did not receive the delicious Swiss cakes that had been promised for afternoon tea. Lord Denning MR observed that

"... the statements in the brochure were representations or warranties. The breaches of them give Mr Jarvis a right to damages. It is not necessary to decide whether they were representations or warranties; because, since the Misrepresentation Act 1967, there is a remedy in damages for misrepresentation as well as for breach of warranty." 54

Similarly, if such a case were to arise in New Zealand, there would be no necessity to demonstrate that representations in the brochure became terms of the contract; section 6 of the Contractual Remedies Act 1979 empowers a New Zealand court to award damages in respect of all misrepresentations in such circumstances, whether they be innocent or fraudulent, and these damages are assessed as if the representations were terms of the contract. The cases outlined above constitute a deceptively straight forward trilogy in that it is not difficult to establish an actionable misrepresentation where the advertisement or other communication inducing a purchase amounts to an objective statement of fact which turns out to be false.<sup>55</sup>

However, much advertising and other promotional material embodies vague and ambiguous claims that are not easily categorised as "false". Subjective statements to

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(54) Ibid, at 237.

(55) See further *Whittington v Seale-Hayne*, supra; *Harris v Nickerson*, supra, at 289.

the effect that products or services are the "best", the "greatest", or are 'stringently tested' may amount to commendatory exaggerations and 'a wide latitude is allowed to traders in extolling the qualities of the things they have to sell'.<sup>56</sup> The principle that *simplex commendatio non obligat* means a trader generally may employ exaggerated and eulogistic commendation without fear of becoming entrapped in the web of misrepresentation rules. The difficult question here is to determine when the claim goes beyond mere "puffery" and constitutes an actionable misrepresentation. As Burrows comments:

"The line to be drawn is that between the commendatory "puff" and provably false and misleading statements; and the comment that 'the borderline of permissible assertion is not always discernible' ... is surely apposite." 57

It will be a question of degree, dependent on all the circumstances of the case, whether a trader exceeds permissible "puffing".<sup>58</sup>

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(56) Bishop, Advertising and the Law (2 ed, 1952), 47; cited in Lawson, op. cit., 16. As Holmes J observed in *Deming v Darling* 20 NE 107, 108 (1889): 'It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, ... which do not imply untrue assertions concerning matters of direct observation ... and as to which it always has been understood, the world over, that such statements are to be distrusted'.

(57) News Media Law in New Zealand (2 ed, 1980), 330.

(58) See *Easterbrook v Hopkins* [1918] NZLR 428, 439 (CA).

For example: In *Smith v Land and House Property Corporation*<sup>59</sup> the plaintiffs advertised for sale a property described as 'now held by a very desirable tenant, for an unexpired term of twenty eight years at £400 per annum'. In fact the tenant was often in arrears with rent and one month after the defendants purchased the property the tenant went into liquidation after which the defendant refused to complete the contract. The Court of Appeal declined to view the description of the tenant in such laudatory terms as constituting mere puffery, and held that the advertisement amounted to an actionable misrepresentation. Similarly, in *Johnson v Ideal Music Publishing*<sup>60</sup> a newspaper advertisement stated that a 'well established firm wishes to get in communication with a reliable young man who is willing to invest at least one thousand dollars with services ... an AI proposition for an ambitious young man'. This was held to constitute a misrepresentation in light of the precarious financial straits that the company was in at the time.<sup>61</sup>

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(59) (1884) 28 Ch.D. 7 (CA).

(60) (1921 ) 20 O.W.N. 326 (Ont. CA).

(61) See also *Brooke v Rounthwaite* (1846) 5 Hare, 298 (laudatory statement that timber trees are of an average size approaching a given number of feet not a mere puff); *Easterbrook v Hopkins* [1918] NZLR 428 (CA) (representation that a business was a valuable one and a 'little gold mine' was actionable); *Gulf Oil Co v FTC* 150 F 2d 106 (1945) (claim by a livestock insecticide manufacturer that the product 'gives a cow complete protection', actionable); *Andrews v Hopkinson* [1957] 1 QB 229 (claim by a seller of a used car that it was a 'good little bus' was not a mere puff).

Conversely, in *Carlay v Federal Trade Commission*<sup>62</sup> a weight reduction plan involving the use of a product called 'Ayds candy' was advertised as being easy to follow. The Federal Trade Commission asserted that the claim was deceptive but it was held that -

"What was said [is] clearly justifiable ... under those cases recognising that such words as "easy", "perfect", "amazing", "prime", "wonderful", "excellent", are regarded in law as mere puffing and dealer's talk upon which no charge of misrepresentation can be based." 63

Furthermore, where a decidedly run down house was described as 'a desirable residence for a family of distinction' this was held not to have any legal consequences;<sup>64</sup> and where land was described as 'uncommonly rich water meadow', where this was not the case, the description was categorised as mere puffery.<sup>65</sup>

The rule relating to "puffery" and the foundation to the maxim *simplex commendatio non obligat* derives from a desire to allow the seller a degree of latitude in

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(62) 153 F 2d 493 (1946).

(63) *Ibid*, at 496.

(64) *Magennis v Fallon* (1828) 2 Mol. 561, 588.

(65) *Scott v Hansen* (1828) 1 Russ & M 128; see also *Dimmock v Hallet* (1866) LR 2 Ch. App. 21 (land which was almost useless was described as 'very fertile and improvable'); *Rasch v Horne* (1930) 3 DLR 647 (estimate of value of crop was 'dealers talk'); *Kidder Oil Co v FTC* 117 F 2d 493 (1946) (a representation that a lubricant will enable a motor vehicle to operate an 'amazing distance' without oil escaped liability).

extolling the virtues of his product or service. It will be difficult for a consumer to persuade a court that "puffery" amounts to a misrepresentation and that this induced the contract as the seller will undoubtedly argue that the public will not take exaggerated and laudatory comments seriously. However, it is submitted that "puffery" must be strictly controlled<sup>66</sup> in these modern times for a number of reasons; that is:

(a) sophisticated packaging often encompasses products thereby rendering them less amenable to inspection and the consumer may place more reliance upon the hyperbole and exaggerated claims made in advertisements and other promotional material than in the days when he could rely more heavily on his own inspection; (b) associated with this point, is the fact that the sophistication of numerous products makes it less likely that any inspection that is carried out will necessarily enlighten the average consumer; for example, consider the average consumer inspecting a colour television set or video cassette recorder; (c) the disparity in bargaining power between the consumer and the large retail company means that the consumer has the election to take a product or to leave it, and it is fanciful to visualise a "haggling"

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(66) Trebilcock, 'Private Law Remedies for Misleading Advertising', (1972) 22 University of Toronto Law Journal 1, 4-5 would go further in that he contends: 'It should never lie in the mouth of an advertiser to argue that a claim was a mere puff and ought not to have been paid attention to. He ought irrebutably to be presumed to have made the claim for a purpose and if somebody, as intended, acts on the claim, no matter how irrationally, the seller should be obliged to live with it.'

process regarding the price and other attributes of the product in question; and (d) there is a real risk that competition in advertising will displace real competition<sup>67</sup> where exaggerated and excessive claims go unchecked; the honest and restrained advertiser is forced to resort to more laudatory and flourishing descriptions and claims in an endeavour to attract custom, and this is ultimately to his detriment<sup>68</sup> and to the detriment of credibility in advertising in general. For these reasons it is suggested that the dictum of Haines J in *Ranger v Herbert A. Watts (Quebec) Ltd*<sup>69</sup> is to be commended to a wider audience. The learned judge remarked:

"It seems to me the time has arrived for an examination of our law upon the obligation of manufacturers and vendors of products to implement their undertaking given in the news media by nationwide advertising. By such means they stimulate reliance upon the safety and quality of their products... . To allow a producer to evade the fair implication of his advertising is to permit him to reap a rich harvest of profit without obligation to the purchaser... . Honesty in advertising is a concept worthy of re-examination." 70

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(67) "Real" competition in the sense of competition with regard to price, quality, quantity and other material attributes. See Chapter I, Introduction, supra.

(68) Such an advertiser may lose his reputation for being a credible seller if manifestly exaggerated claims are made.

(69) (1970) 10 DLR (3d) 395.

(70) Ibid, 404-405. Similarly in *Esso Petroleum Ltd v Commissioners of Customs and Excise* [1976] 1 All ER 117, 121, Lord Simon of Glaisdale commented that 'it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations'.

Consequently, it is hoped that decisions such as *Dimmock v Hallett*<sup>71</sup> and *Scott v Hansen*<sup>72</sup> would, if similar factual circumstances arose today, be decided the other way, and that the descriptions of the land would not be dismissed as mere puffery.

Before leaving this appraisal of the nature of misrepresentations in the context of advertising and the disclosure of other information preparatory to sale, mention must be made of the fact that much advertising is directed at emotional or psychological needs; that is, appeals to an individuals need for approval, love or happiness.<sup>73</sup> Where a claim is made in respect of the characteristics or attributes of a product or service the law relating to misrepresentation may assist the consumer where he has entered into a contract in reliance upon this claim, and the claim turns out to be false. This distinction between truth and falsity works tolerably well when applied to factual elements such as the price, quality, and so forth, but when applied to image appeals it becomes largely unworkable.<sup>74</sup> In any event, as Duggan<sup>75</sup> observes

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(71) Supra.

(72) Supra. The statement in this case and in *Dimmock's* case do not seem to be so obviously exaggerated and vague so as to preclude reliance.

(73) See Barnes and Blakeney, 'The Regulation of Children's TV Advertising - The Australian Experience', (1980) 1 *Journal of Media Law and Practice* 265, 273. See Chapter IV, *Statutory Regulation of Advertising*, infra.

(74) See Chapter IV, *Statutory Control of Advertising*, infra.

(75) 'Fairness in Advertising: In Pursuit of the Hidden Persuaders', (1978) 11 *Melbourne University Law Review* 50.

"In some cases, a finding that a claim is misleading or untruthful will result in nothing more than the replacement of one superlative with another, or of an alluring claim with an equally alluring image." 76

Re (ii) Misrepresentation 'by or on behalf of another party'.

Section 6 of the Contractual Remedies Act 1979 applies to misrepresentations made to the consumer by or on behalf of another party to the contract'. Consequently, where the false or misleading claim emanates from the seller, or an agent of the seller no difficulty arises.<sup>77</sup> However, complicated questions arise as to the seller's liability for advertising claims made by the manufacturer or some other person (such as a national distributor or wholesaler) who is not a contracting party. In many cases the contract for the sale of goods or supply of services or credit will not be made with the advertiser and clearly no claim may have been made *by* the seller or supplier in such circumstances. Can it be argued, though, that the claim was made *on behalf of* the seller or supplier?

Where, for example, a retailer has approached the manufacturer of a particular product requesting him to run

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(76) Ibid, at 54.

(77) Obviously, the agent must be acting within the scope of his authority, express, implied, or apparent. See *Ludgater v Love* (1881) 44 LT 694; *Pearson & Son Ltd v Dublin Corporation* [1907] AC 351, 354. Generally, see Fridman, The Law of Agency (4 ed, 1976), 245-247.



an advertising campaign to promote the sale of that product, a strong argument may be made out that the advertising and any claims therein is on behalf of the retailer. Furthermore, the retailer may be liable in circumstances where he adopts the manufacturer's advertising claims, as where he draws the consumer's attention to the manufacturer's advertisements or sales brochures.<sup>78</sup> Trebilcock<sup>79</sup> asserts that

"... in the case where the manufacturer by arrangement with his distributors provides 'blanket' advertising for his product, the distributors would seem clearly to have adopted the manufacturer's claims." 80

However, there is a dearth of authority in this area and the best course of action for a consumer who has entered into a contract with a seller, who is not the advertiser, is to take issue with the advertiser directly in respect of any false claim made in the advertisement. Section 6 of the Contractual Remedies Act 1979 only regulates the position where the representation is made 'by or on or behalf of another party to the contract'; consequently, potential tort liability for negligence or deceit remain *vis-a-vis* an advertiser who is not party to the contract

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(78) See *Murray v Sperry Rand Corp* (1979) 23 OR 456, 96 DLR (3d) 113; *Silverstein v R.H. Macey & Co* 40 NYS 916 (1943).

(79) *Op. cit.*; see footnote 66.

(80) *Ibid*, at 6.

for the sale of goods or supply of services or credit.<sup>81</sup> Furthermore, in appropriate circumstances, a collateral agreement between the consumer and the manufacturer may be established.<sup>82</sup>

Re (iii) The Misrepresentation must have induced the contract.

Treitel<sup>83</sup> succinctly states the position as follows:

"A representation has no effect if the person to whom it is made does not rely on it. A person obviously cannot claim relief if the representation never came to his notice, or if he knows the truth, or if he relies on his own information, or if he deliberately takes the risk of the representation turning out to be true." 84

A case that serves as an excellent illustration is *Poole and McLennan v Nourse*.<sup>85</sup> The respondent advertised in a farming magazine that his farm of some 6300 acres was for sale. He also represented in the advertisement that a store on the farm was earning £60 per month, that a timber interest in a syndicate brought in £100 per month and that charcoal rights brought in £80 per month. The appellants who had read the advertisement, and subsequently had purchased the farm, alleged that they had been induced to buy through the fraudulent statements contained in this advertisement. Solomon JA, in delivering the

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(81) See Tortious liability, *infra*, at 137.

(82) See Collateral Contracts, *infra*, at 116.

(83) *Op. cit.*; see also Cheshire and Fifoot, *op. cit.*, 233.

(84) *Ibid*, 220. It is submitted that "inducement" in the Act and "reliance" at common law are the same.

(85) 1918 AD 404.

judgement of the Appellate Division of the Supreme Court of South Africa, stated *inter alia*, that:

"... the evidence shows that the title deeds, in which the true extent is set forth, were shown to the [appellants], and the written contract itself signed by them states that the farm is 'in extent 2,551 morgen'. In these circumstances it is hopeless to expect us to differ from the conclusion arrived at in the court below that the defendants were not misled by the statement in the advertisement on the subject." 86

Furthermore, the learned judge observed that while the statements in the advertisement on the subject of the store, the timber and the charcoal were grossly false this was not the end of the matter. He stated:

"... In these circumstances if the matter had rested there, and if the [appellants] had bought the farm on the strength of the [respondent's] advertisement, it would of course not be open to question that they would have been fully entitled to repudiate the contract. But the case does not rest there for ... the [appellants] had paid a visit to the farm and remained there for over three days, during which time the whole position was fully discussed between them. The [respondent] alleges that at these interviews the true state of affairs was disclosed to the [appellants], and that they were completely set right with regard to the false statements contained in the advertisement. ... There was ample evidence ... to justify the conclusion arrived at by the court below that the representations regarding the timber syndicate and the charcoal were of no importance as the [appellants] were placed in possession of the true facts by the [respondent] before they decided to purchase the farm." 87

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(86) Ibid, 418-419.

(87) Idem.

Consequently, the consumer has no cause for complaint where he actually knows that the representation is false since he cannot assert that he has been misled by the representation.<sup>88</sup>

Moreover, the consumer cannot complain if the advertising claim or other pre-contract communication did not influence his judgement. For example, in *Bird v Murphy*<sup>89</sup> the plaintiff sued for rescission of a contract for the sale of a Mercedes Benz motor car for which he had paid R2600; he alleged that he had been induced to purchase by the fraudulent, or alternatively innocent, misrepresentation by the defendant that the car was a 1957 model, whereas in fact it was an earlier 1953 model. However, the evidence disclosed that before even discussing the purchase of the car with the defendant he had 'taken a fancy' to the vehicle and had decided to offer R2600 for it. The court held that the defendant had made a misrepresentation regarding the model, but there was no inducement shown. Similarly, where the consumer regards the representation as unimportant<sup>90</sup> or relies exclusively upon his own skill and judgment,<sup>91</sup> the consumer cannot

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(88) See also *Jennings v Broughton* (1854) 5 De G.M. & G 126; *Begbie v Phosphate Sewage Co* (1875) LR 10 QB 491.

(89) (1963) 2 PH, A 42 (D).

(90) See, for example, *Smith v Chadwick* (1884) 9 AC 187, 194.

(91) See, for example, *Attwood v Small* (1838) 6 Cl. & F 232; *Holmes v Jones* (1907) 4 CLR 1692.

argue successfully that the representation has 'induced' entry into the contract. However, the mere fact that a consumer has the opportunity to test the accuracy of a representation and does not take it does not preclude him from obtaining relief.<sup>92</sup>

Finally, on the question of inducement it is clear that section 6 of the Contractual Remedies Act 1979 does not require that the representation be shown to be *material*.<sup>93</sup> The question of inducement is a matter dependent upon the consumer's own state of mind, as opposed to "materiality" which is referable to the state of mind of a 'reasonable man of business'.<sup>94</sup> As Wells J remarked in *Lyndon v Coventry Motors Retailers Pty Ltd*<sup>95</sup> 'a person relies on a statement in an advertisement where that statement induces him,<sup>96</sup> ... in the manner and mode of a potential customer, to respond to the advertisement by some overt act'. Of course, if the representation is shown to be material, in the sense that a reasonable person may have been induced to enter into the contract in question, the consumer may more easily discharge the onus of demonstrating inducement.<sup>97</sup> It is also clear that the consumer is not required to show that the

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(92) See *Redgrave v Hurd* (1881) 20 Ch.D. 1; *Wiley v African Realty Trust Ltd* 1908 T.H. 104.

(93) See Dawson and McLauchlan, op. cit., 24-25.

(94) See Treitel, op. cit., 222.

(95) (1974-75) 11 SASR 308, 313.

(96) Dawson and McLauchlan, op. cit., 25 comment that 'if a representation is of such a nature that it would be likely to induce a reasonable person to enter into the particular contract, the court will draw the inference in the absence of convincing evidence to the contrary from the representor'.

representation was the only inducement.<sup>98</sup>

Provided the consumer can establish that he was induced to enter into a contract for the purchase of a particular product or for the supply of particular services by a misrepresentation made by or on behalf of a seller or supplier, he is entitled to damages as if that representation were a term of the contract; that is, the consumer is entitled to be put in as good a position as if the representation had been true.<sup>99</sup>

(b) The remedy of cancellation.<sup>100</sup>

A consumer is entitled to cancel a contract where it has been induced by a misrepresentation but only if the contracting parties have expressly or impliedly agreed that the truth of the representation is essential to the consumer,<sup>101</sup> or it is shown that the representation has a

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(98) See *Reynell v Sprye* (1851) 1 De G. M & G 656; *Edgington v Fitzmaurice* (1885) 29 Ch.D. 459; *Barton v Armstrong* [1976] AC 104, 119.

(99) See, for example, *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167; Stoljar, 'Normal Effective and Preparatory Damages in Contract', (1975) 91 LQR 68.

(100) This topic is dealt with at some length in Dawson and McLauchlan, *op. cit.*, 45-52 who point out that the great majority of modern cases (i.e. post *Redgrave v Hurd*, *supra*) 'in which rescission for misrepresentation was granted concerned misrepresentations which would undoubtedly satisfy the requirements of [the Contractual Remedies Act 1979], s 7(4)(b)'.

(101) Contractual Remedies Act 1979, s 7(4)(a).

substantial effect upon the benefit or burden of the contract to the consumer.<sup>102</sup>

Clearly the effect of this legislation is to restrict the circumstances in which the remedy of cancellation may be granted to those cases where the misrepresentation has a substantial impact upon the party wishing to cancel. Where there is express agreement as to essential nature of a representation no difficulty arises.<sup>103</sup> As regards representations which are 'impliedly' essential, Dawson and McLauchlan suggest<sup>104</sup> that an appropriate test would be:

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(102) Ibid, s 7(4)(b). Note, that where the misrepresentation comes forward as a term of the contract complications arise as the Sale of Goods Act 1908 may come into play. The Contractual Remedies Act 1979 expressly provides, in section 15(d), that except as provided in sections 4(2), 6(2) and 14, nothing in that Act shall affect the Sale of Goods Act 1908. Consequently, where the misrepresentation is term of the contract for the sale of goods, rescission in terms of the Sale of Goods Act 1908 will be the appropriate remedy, and its availability will depend upon whether the term amounts to a condition or a warranty. See the Sale of Goods Act 1908, ss 13, 54; *Finch Motors Ltd v Quin* [1980] 2 NZLR 519.

(103) Apart, perhaps, from a conceptual difficulty; if parties agree that a representation is essential then it will usually follow that that statement will be incorporated into the contract, and will not be a representation in the strict legal sense at all. See Dawson and McLauchlan, op. cit., 48.

(104) Op. cit., 48. This test is adapted from that enunciated by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, 641-642 and followed in New Zealand in *Holmes v Burgess* [1975] 2 NZLR 311, 320.

"(D)oes it appear from the surrounding circumstances that the representation was of such importance to the representee that he would not have entered into the contract if the representation had not been made, and this ought to have been apparent to the representor."

Such a test would work reasonably well in circumstances where the consumer seeks an assurance from the seller or supplier that a claim in an advertisement for a product or service is reliable, and intimates that he would not proceed with the transaction unless such an assurance is given. However, where the consumer in reliance upon a misrepresentation made by a seller or supplier in an advertisement simply enters into a contract for a product or service his better course of action, in seeking cancellation, would be to argue that the misrepresentation has a substantial effect.<sup>105</sup> The consumer must establish that the consequences of misrepresentation are such that he ought not to be held to the contract. Consider a recent breach of contract case decided pursuant to s 7(4)(b) of the Contractual Remedies Act 1979. In *Gallagher v Young*<sup>106</sup> an agreement for the purchase of a dwellinghouse was in issue. The agreement included a warranty stating that there was no outstanding requirement imposed by local or government authorities in respect of the property which had not been disclosed to the purchaser. In fact, after settlement and the plaintiff

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(105) Contractual Remedies Act 1979, s 7(4)(b).

(106) [High Court, Hamilton, A 116/80; 4 August 1981.]



taking possession, it was discovered that a number of improvements made by the defendant vendor failed to comply with, *inter alia*, relevant building, plumbing and electrical supply regulations. Greig J held that non-compliance with the express terms of a building permit and a power board inspection notice constituted breaches of a "stipulation" within the language of the Contractual Remedies Act 1979, and given the significant cost and alterations to the house that would be required to effect compliance, the learned judge held that cancellation of the contract was an appropriate remedy.<sup>107</sup>

Provided the consumer can demonstrate that he was substantially prejudiced by the misrepresentation he will be entitled to cancel. Clearly in cases such as *Whittington v Seale-Hayne*,<sup>108</sup> *Smith v Land and House Property Corporation*<sup>109</sup> and *Kenny v Fenton*<sup>110</sup> this remedy will be available; in cases such as *Capital Motors Ltd v Beecham*,<sup>111</sup> where the misrepresentation has a relatively minor effect, the consumer should be relegated to a claim in damages.

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(107) *Ibid*, at 13.

(108) *Supra*.

(109) *Supra*.

(110) [1971] NZLR 1 (CA) (fraudulent misrepresentations as to the turnover of a business which induced the sale of a motel concern; actual turnover substantially less thereby affecting the viability of the enterprise and the representee's ability to meet repayments).

(111) *Supra*, (negligent misrepresentation as to number of previous owners that a car had had; tortious measure of damages amounting to \$100 being the difference between the price paid of \$1400, and the market value of \$1300, at the time of purchase).

In theory, therefore, the consumer is arrogated adequate remedies in respect of misrepresentations embodied in advertisements, etc., or communicated to him prior to his entry into a contract for the sale of goods or supply of services. In practice, these remedies may not be available due to the vagueness and ambiguity of claims in advertisements, nor feasible in that even where the consumer can point to a false statement of the fact the potential benefits accruing through the successful pursuit of his legal rights might be outweighed by the risks associated with failure; namely, costs in terms of time, effort and payment for legal representation. This latter point is even more poignant in respect of transactions involving low cost items.<sup>112</sup>

### (3) COLLATERAL CONTRACT

Where a consumer is induced to enter into a contract with a retailer by virtue of advertising emanating from a manufacturer it may be possible to construe a contract between the consumer and the manufacturer.<sup>113</sup> In

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(112) These matters, amongst others, will be elaborated upon in the Conclusion to this chapter.

(113) Such contracts, designated 'collateral contracts', have been recognised for some considerable time. See Wedderburn, 'Collateral Contracts', [1959] Cambridge Law Journal 48, and the cases there cited. The case of *Carlill v Carbolic Smoke Ball Co* (supra) easily could be analysed in terms of collateral contract principles, as opposed to a unilateral offer basis.

*Heilbut Symons & Co v Buckleton*<sup>114</sup> Lord Moulton stated:

"It is evident, both in principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract."<sup>115</sup>

In appropriate circumstances the manufacturer's advertisement may be regarded as amounting to an offer to warrant that the goods are as represented in the advertisement, and the consumer may accept this offer by entering into a contract with the retailer for the purchase of the particular product. For example, in *Shanklin Pier Ltd v Detel Products*<sup>116</sup> the defendant company recommended that the plaintiff should use their product when repainting a pier and assured the plaintiff that their product would give protection lasting for seven years. The plaintiff when employing contractors to do the paint work instructed them to buy and use the paint manufactured by the defendants. The paint in fact lasted three months. It was held that, although the main contract for the sale of paint obviously was between the contractors and the defendants, there was a collateral contract between the

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(114) [1913] AC 30.

(115) *Ibid*, 47; see also *Coffey v Dickson* [1960] NZLR 1135, 1140.

(116) [1951] 2 KB 854.

plaintiff and the defendant manufacturer that the paint would last for seven years. A case that provides an even better illustration is *Murray v Sperry Rand Corporation*.<sup>117</sup> A farmer was induced to purchase a harvester from a local dealer through, *inter alia*, representations made in a sales brochure prepared and published by the defendant manufacturer. The sales brochure asserted that the machine would 'harvest over 45 tons per hour with ease' but, in fact, the performance of the harvester fell drastically short of what had been promised. In an action against the manufacturer, the Supreme Court of Ontario held that the plaintiff had established the existence of a collateral contract. Reid J held that the manufacturer had, through the brochure, presented his case to the customer 'just as directly as he would if they were sitting down together to discuss the matter'.<sup>118</sup> The case, he held, was on all fours with the *Shanklin Pier* case and the defendant manufacturer was held liable for breach of the collateral contract containing the warranty as to performance.<sup>119</sup>

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(117) (1979) 23 OR 456; (1979) 96 DLR (3d) 113.

(118) (1979) 23 OR 456, 467.

(119) See also *Traders Finance Corporation Ltd v Haley* (1966) 57 DLR (2d) 15 where plaintiff in the course of negotiations for the purchase of three trucks was shown a copy of a magazine advertisement by the manufacturer, Ford Motor Company, which represented that the motors of the trucks were 'super duty engines' which after 150,000 miles required no major repairs. The plaintiff succeeded in a counterclaim action against Ford Motor Company for breach of warranty contained in the collateral contract; furthermore, in *Ranger v Herbert A. Watts (Quebec) Ltd* (1970) 10 DLR (3d) 395 a tobacco manufacturer was held liable to a consumer for breach of contract arising out of the purchase of a packet of cigarettes of a brand which had been subject to an advertising promotion.

Another situation where the collateral contract has proved useful is the hire purchase financing area. Suppose a consumer approaches a dealer and wishes to acquire a chattel on hire purchase terms. The dealer in inducing the sale may make extravagant claims and misrepresentations but where the direct collection method of financing is employed<sup>120</sup> the actual contract of hire purchase will be with the finance company, and not the dealer. For example, in *Mihaljevic v Eiffel Tower Motors Pty Ltd and General Credits Ltd*<sup>121</sup> a dealer, in order to induce the plaintiff to sign an offer to a credit company to acquire a vehicle on hire purchase terms, stated that the vehicle was 'in good condition'. As later events bore out, the vehicle was in a very defective condition. Gillard J held that the dealer in making the statement promised to the plaintiff that he would have no trouble from the vehicle for a reasonable period of time. Consequently there was a collateral contract between the plaintiff and the dealer whereby the dealer warranted that the vehicle was in a good condition. Similarly, in *Andrews v Hopkinson*<sup>122</sup> a car dealer told a customer who was interested in a particular vehicle, 'Its a good little bus. I would stake my life on it. You will have no trouble with it'. The customer then acquired the car under a hire

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(120) That is, where the goods are sold by the dealer to the finance company which then lets them on hire purchase to the customer. The instalments or hiring charges are collected directly from the hirer/customer by the finance company.

(121) [1973] VR 545.

(122) [1957] 1 QB 229.

purchase agreement entered into with a finance company. It was held that the dealer's assurance was part of a collateral contract with the customer, who recovered substantial damages for breach when the car crashed due to defective steering.<sup>123</sup>

What then must the consumer establish in order to found an action based on a collateral contract? Consider this question in light of an advertising claim made by a manufacturer in respect of his product, which the consumer subsequently acquires from a retailer. *First*, the consumer must demonstrate that the manufacturer made a promise which the consumer could reasonably regard as being made *animo contrahendi*.<sup>124</sup> The test employed is an objective one, in that '(i)f an intelligent bystander would reasonably infer that a warranty was intended, that would suffice even though neither party in fact had it in mind'.<sup>125</sup> Consequently, the manufacturer may not evade

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(123) See also *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All ER 1102; *Yeoman Credit Ltd v Odgers* [1962] 1 All ER 789. Note that in New Zealand there is no necessity to find a collateral agreement in such circumstances because by virtue of section 17 of the Hire Purchase Act 1971 such statements by a dealer are deemed to be made by him as agent for the finance company and therefore can be regarded as terms of the agreement concluded by the consumer with the finance company.

(124) See, for example, *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd* [1965] 2 QB 170, 180.

(125) *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, 328. This test was applied by Gillard J in the *Mihaljevic* case, *supra*, at 556.

liability by asserting that he never intended to create any legal relationship with the consumer. The question whether *animus contrahendi* exists is a question of fact determined objectively in the light of the whole of the circumstances. For example, in *Murray v Sperry Rand Corporation*<sup>126</sup> the manufacturer argued that the sales brochure was not intended to persuade people to buy the machines described therein. However, Reid J held that that view was contradicted by the brochure itself.

"Its tone is strongly promotional. It goes far beyond any simple intention to furnish specifications. It was ... a sales tool. It was intended to be one and was used in this case as one." 127

*Second*, the consumer must acquire the product in reliance upon the manufacturer's promise.<sup>128</sup> It is clear that the manufacturer's promise need not be the sole inducement<sup>129</sup> and it is submitted that reliance should be readily inferred in consumer sales.<sup>130</sup> Proof of reliance accepted by the court in *Murray v Sperry Rand Corporation*<sup>131</sup>

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(126) Supra.

(127) (1979) 23 OR 456, 465.

(128) See, for example, *Wells* case, supra, at 180.

(129) See cases under 'Misrepresentation', supra.

(130) Such reliance is readily inferred in respect of the implied terms as to merchantable quality and fitness for purpose under the Sale of Goods Act 1908, section 16, and there does not appear to be any logical ground for treating the manufacturer more favourably than the retailer; a consumer should be taken to rely on a manufacturer's advertising claims in selecting what product he will buy. See, for example, *Grant v Australian Knitting Mills* [1936] AC 85, 99.

(131) Supra.

was oral testimony by the plaintiff that he had taken the sales brochure home and read it over several nights before buying the harvester. One Canadian writer<sup>132</sup> comments that this case may herald a relaxation of the strict requirements of proof of reliance in that such reliance was held to be established in spite of the fact that the plaintiff was 'sometimes unable to recall with accuracy, sometimes confused and sometimes self-contradictory'.<sup>133</sup> Finally, it is no bar that the advertising claim was made some time before the actual contract of sale was entered into with the retailer.<sup>134</sup> Provided the consumer can establish the joint requirements of *animus contrahendi* and reliance he may recover damages from the manufacturer for breach of warranty as embodied in the collateral contract.

Despite the assertion in *Heilbut, Symons & Co v Buckleton*<sup>135</sup> that 'collateral contracts must from their very nature be rare',<sup>136</sup> the courts have not been too

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(132) Schwartz, 'Jurisprudential Developments in Manufacturer's Liability for Defective Products where the only damage is economic loss', (1979-80) 4 Canadian Business Law Journal 164, 174.

(133) *Supra*, at 460 (OR). No doubt allowance was made for the fact that the evidence was given 10 years after the event.

(134) *Coffey v Dickson*, *supra*, at 1143. Richmond J stated ... 'I do not myself think that a verbal warranty need be collateral in the sense of contemporaneous with a written contract'.

(135) *Supra*.

(136) *Ibid*, 47.



unwilling to find a collateral contract in circumstances where a manufacturer makes an assertion about his product which acts as a catalyst to bring about a transaction with a third party. This attitude is to be welcomed as it may offer the only avenue of redress in respect of innocent misrepresentations made by a manufacturer in his advertising.<sup>137</sup> Consequently the manufacturer may be held liable in damages caused by a false statement without proof of fraud or negligence. Waddams<sup>138</sup> comments that these collateral contract cases

"... can be supported ... as part of the law of products liability. The business supplier of a product should, *vis-a-vis* the innocent consumer, bear the risk of damage caused by false statements made in the course of business, just as he bears the risk of damage caused by defects." 139

This writer respectfully concurs in this view.

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(137) If the misrepresentations were negligent or fraudulent then the consumer may have a common law action in deceit or negligence; see infra. Note that the Contracts and Commercial Law Reform Committee in their Working Paper on Warranties in The Sale of Consumer Goods (1977), para. 19, recommend that the consumer should have direct recourse against a manufacturer for breach of an implied warranty of acceptability (see para. 14) and the manufacturer could be liable for 'any express statements, affirmations, descriptions or promises made or published by the manufacturer or with his express or implied authority known to the buyer at the time of the original consumer sale'. This would greatly improve the position of a consumer *vis-a-vis* a manufacturer.

(138) Op. cit.

(139) At 260.

(4) EXCLUSION CLAUSES AND GUARANTEES.<sup>140</sup>

Certain types of contractual terms which seek indirectly to exclude liability for pre-contract statements are regulated by the Contractual Remedies Act 1979.<sup>141</sup> It is by no means uncommon to find clauses to the following, or like effect, in contracts:

"This document contains the whole of the contract between the parties hereto."

"I acknowledge that I have inspected the vehicle and have relied upon such inspection and my own judgement in contracting for the same and that no warranties representations or promises have been made by you or your servants except those given in writing and endorsed hereon." 142

Notwithstanding the presence of such clauses, a New Zealand court is not precluded from ascertaining the true state of affairs 'unless the court considers that it is fair and reasonable that the provision should be

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(140) A detailed consideration of this topic is beyond the scope of this dissertation as the topic could validly be the subject of a substantial book. Consequently, it is proposed to simply outline the relevant law. Note, too, that the Contracts and Commercial Law Reform Committee, Working Paper on Warranties in The Sale of Consumer Goods (1977), paras 16, 23, recommend that exemption clauses be strictly curtailed in scope and application.

(141) S 4.

(142) Cited in Dawson and McLauchlan, op. cit., 36.

conclusive between the parties'.<sup>143</sup> Where the consumer has been induced to enter into a transaction of some magnitude with a large retail concern by misrepresentations made in advertisements or discussions preceding the sale, it is unlikely that the court will regard any 'merger' or 'acknowledgement' clause<sup>144</sup> in the contract as being conclusive. The disparity in bargaining power between the average consumer and a large retail concern and the unlikelihood of the consumer having received independent legal advice prior to commitment are significant factors to be weighed in the balance. However, every case will turn on its own facts and the court may have regard to all the circumstances of the case in deciding whether it is fair and reasonable that the clause should be conclusive. As Wilson JA observed in *Chomedy Aluminium Co Ltd v Belcourt Construction (Ottawa) Ltd*<sup>145</sup>

"Many exclusionary clauses ... which in isolation seem unfair and unreasonable are not so when viewed in their contractual setting and may, indeed, constitute part of the *quid pro quo* for benefits received through hard negotiation." 146

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(143) Contractual Remedies Act 1979, s 4(1). In deciding whether a clause should be treated as conclusive or not the court shall have regard 'to all the circumstances of the case, including the subject matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time'; cf: The Unfair Contract Terms Act 1977, s 55(5) (UK); Trade Practices Act 1974, s 68A (Australia).

(144) Such as those outlined above.

(145) (1979) 97 DLR (3d) 170 (Supreme Court of Canada).

(146) *Ibid*, 177; see also *Photo Production Ltd v Securicor Transport Ltd* [1980] 2 WLR 283, 294.

Where a clause in a contract simply denies the existence of any agency or authority to make representations, the court does not have to apply a 'fair and reasonable test', but may inquire directly into what the true position is.<sup>147</sup>

It must, however, be emphasised that section 4 of the Contractual Remedies Act 1979 does not authorise the court 'to disregard true exemption clauses - clauses which exclude or limit liability, or the availability of any remedy, for misrepresentation or breach of contract'.<sup>148</sup> Section 5 of the Contractual Remedies Act 1979 provides that

"If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 of this Act relate, those sections shall have effect subject to that provision."

For example, where a clause in a contract provides that 'no misrepresentation or misdescription of the goods by the seller shall entitle the purchaser to cancel the contract or to claim compensation or damages' this clause would not be covered by section 4 of the Act in that it

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(147) Contractual Remedies Act 1979, s 4(2); for example, where an attempt is made to exclude liability in circumstances where the sale is effected by some intermediary such as a salesperson.

(148) Dawson and McLauchlan, op. cit., 38; these writers make the pertinent comment that "(i)t is anomalous that s 4 enables a court to disregard a clause saying 'there are no representations' but not one saying 'no liability for representations'."

does not deny the existence of representations made in the pre-contractual setting. The question here, therefore, is whether the exclusion of all liability for misrepresentation would, pursuant to section 5 of the Act, exclude the application of sections 6 to 10 of the Act. It may be argued that on a literal reading of section 5 the provision for no remedy would not be effective to contract out of liability for misrepresentation.<sup>149</sup>

Clearly the rationale behind the inclusion of section 5 was that parties to a contract should be free to define the extent of their rights and obligations and to outline the consequences to be visited upon any breach of those obligations.<sup>150</sup> It is submitted that if an exclusion clause provided that damages in respect of any misrepresentation were to be limited to fifty dollars and that no misrepresentation could ground cancellation, such a clause would fall within the ambit of section 5 and be effective to contract out of liability for misrepresentation;<sup>151</sup> that is, a remedy in the form of compensatory damages has been agreed upon by the parties with an upper limit being imposed upon the amount recoverable. Therefore, it would be highly anomalous if the effectiveness or otherwise of such clauses should turn on such fine distinctions; namely, the dichotomy between the situation where 'no remedy' is stipulated as opposed to where a

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(149) See Dawson and McLauchlan, op. cit., 184-186.

(150) See the Contracts and Commercial Law Reform Committee, Misrepresentation and Breach of Contract (1967), para 20; [1979] New Zealand Parliamentary Debates 77; 624.

(151) Dawson and McLauchlan, op. cit., 186, argue that clauses placing a ceiling on the amount recoverable do not provide a remedy. This writer respectfully disagrees with this contention.

remedy in damages limited to fifty dollars is provided. It is submitted that on a fair, large and liberal interpretation<sup>152</sup> of section 5 that section may fairly be said to encompass the situation where the parties have expressly agreed that 'no remedy' is to be given for misrepresentation.

Section 5 therefore provides an escape route whereby the seller may protect himself against liability for misrepresentations made to a consumer prior to the conclusion of a contract for the sale of goods, whether those misrepresentations were made orally, embodied in advertising material disseminated by the seller, or elsewhere. What, however, is the position where the misrepresentation emanates from a non-contracting party, such as the manufacturer of the product, and the consumer is induced to enter into a contract with the seller on the basis of such misrepresentation? Two distinct matters fall to be considered here; namely, (i) the possibility or otherwise of the manufacturer relying on an exclusion clause contained in the contract entered into between the consumer and the seller; and (ii) manufacturers' guarantees.

Re (i): Can the manufacturer exclude liability for negligent or fraudulent misrepresentations<sup>153</sup> or for

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(152) As directed by section 5(j) of the Acts Interpretation Act 1924.

(153) These topics are discussed below under Tortious Remedies.

breach of a collateral agreement by pointing to an exclusionary clause embodied in the contract between the consumer and the seller? Where the manufacturer authorises the seller to act as his agent and the seller enters into a contract containing an exclusion clause, the manufacturer may be protected. Authority for this proposition derives from a number of shipping cases whereby the agency device has been employed in order to convert an apparent stranger to a contract into a party to it, thereby allowing him to take the benefit of an exclusion clause in that contract.<sup>154</sup> A common clause in bills of lading, which contain the shipping contract entered into between the shipper and carrier,<sup>155</sup> purports to extend the benefit of defences and immunities conferred by the bill on the carrier to independent contractors<sup>156</sup> employed by the carrier. Whether an independent contractor can claim the benefit of such a clause, or not, is contingent upon him satisfying the prerequisites for the validity of an agency argument as

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(154) See, for example, *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, 474; *New Zealand Shipping Co v Satterthwaite & Co Ltd* [1975] AC 154; *Herrick v Leonard and Dingley Ltd* [1975] 2 NZLR 566; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* [1980] 3 All ER 257.

(155) Generally see Gutteridge and Megrah, *The Law of Bankers' Commercial Credits* (5 ed, 1976), 90.

(156) Such as stevedores.

as spelt out by Lord Reid in the *Midland Silicones* case.<sup>157</sup> Lord Reid stated:

"I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome."

In *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd*<sup>158</sup> goods sold by an English exporter were shipped to a New Zealand buyer in Wellington. The goods were damaged in the course of unloading due to the negligence of the stevedores, and the New Zealand buyer brought an action in tort against them for the negligent damage of the goods. The stevedores sought to shelter behind an exemption clause contained in the bill of lading which excluded any liability on the part of independent contractors employed by the carrier. The major issue was whether the fourth pre-requisite as outlined by Lord Reid was satisfied. The court reasoned that the clause was to be

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(157) *Supra*, at 474; (footnote 154).

(158) [1975] AC 154.



regarded as an offer of exemption by the buyer which was accepted by the stevedores when they commenced the unloading of the goods; the consideration was the performance of the service of offloading the goods for the benefit of the buyer. Atiyah<sup>159</sup> contends that in these circumstances the use of exemption clauses is often commercially desirable.

"The point is that goods consigned by sea are almost invariably insured, and the relations between the carrier and the owner are anyhow largely regulated by international conventions. If the stevedore is not entitled to be protected against liability for negligence, stevedore firms will have to insure against that liability, and hence charge more for their services." 160

There can be little doubt that the decisions in *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co*

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(159) An Introduction to the Law of Contract  
(3 ed, 1981).

(160) Ibid, 280.

*Ltd*,<sup>161</sup> *Herrick v Leonard and Dingley Ltd*<sup>162</sup> and the *Port Jackson Stevedoring case*<sup>163</sup> accord with commercial realities and it appears perfectly fair and reasonable that the straightjacket of privity should be circumvented in these circumstances. The courts, however, have demonstrated a commendable reluctance to extend the benefit of an exemption clause to a third party where the result of such an extension would be to deprive the contracting party of a remedy in damages in respect of personal injuries.<sup>164</sup> Consequently, it could be thought

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(161) Supra.

(162) Supra.

(163) Supra.

(164) See, for example, *Adler v Dickson* [1955] 1 QB 158; *Gore v Van Der Lann* [1967] 2 QB 31; cited in Atiyah, op. cit., 279-280.

likely that outside the commercial arena,<sup>165</sup> strict adherence to the principle espoused in *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd*<sup>166</sup> would largely negative the possibility of a manufacturer relying on an exclusion clause embodied in a contract between a seller and the consumer. However, sweeping reform proposed in the Contracts (Privity) Bill 1981 may have significant impact in this area. Clause 4 of the Bill reads:

"Where a promise contained in a deed or a contract confers or purports to confer a benefit on a person who is not a party to the deed or contract ... the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise."

'Benefit' is defined in clause 2 as including 'any advantage, any immunity and any limitation or other qualification of rights or obligations', with the result that clause 4 presumably covers the conferring of a benefit on a third party by way of exclusion of

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(165) The Privy Council emphasised, in *Satterthwaite's* case, that the contract was of a commercial character, for business reasons of profit, whereas the normal consumer transaction does not reflect the same considerations.

(166) [1913] AC 847.

liability.<sup>167</sup> This being the case, the way is open for a manufacturer (by arrangement with the various retailers that he supplies) to evade liability for any pre-contract misrepresentation through the simple expedient of incorporating a suitable exemption clause in the standard form contract of sale form used by the retailers concerned.

Re (ii): Manufacturers' guarantees. The consumer may select goods which will be supplied with a guarantee, not from the seller, but from the manufacturer. A typical guarantee will promise that goods (or services) are of a certain quality and that if they are not, the manufacturer will take certain steps to remedy any defect, replace the goods or refund any money paid.<sup>168</sup> However, such guarantees often purport to exclude or restrict certain legal rights which might otherwise exist against the manufacturer giving the guarantee. What, for example, would be the effect of a clause in a guarantee which provided that 'it is a term of the guarantee that

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(167) It is interesting to note that a similar device is employed in bills of lading; that is, the shipper of goods undertakes that he will not sue third parties; this undertaking being part of a binding contract between the shipper and carrier, can be enforced by the carrier, who can therefore protect those third parties. See *The Elbe Maru* [1978] 1 Lloyd's Rep 206; Atiyah, *op. cit.*, 281.

(168) See Cusine, 'Manufacturers' Guarantees and the Unfair Contract Terms Act', (1980) 2 The Juridical Review 185. The undertaking to replace or repair goods usually is subject to the product being used in accordance with the manufacturer's instructions, the goods being returned to the manufacturer, and the defect being brought to the manufacturer's attention within a prescribed time period. See, for example, the guarantee given by Black and Decker (NZ) Ltd in respect of the power tools manufactured by that company.

no action shall be brought to enforce any oral promises or representations made by the manufacturer and the consumer waives all rights which he might otherwise have in respect of any such oral promises or representations'?'<sup>169</sup> In general, the legal effect of such an exclusion clause contained in a guarantee will depend on whether there is a contract between the consumer and the manufacturer. In exceptional circumstances there might be an express contract between the manufacturer and the consumer where, for example, the consumer having purchased the goods then enters into a separate contract with the manufacturer for the maintenance of the goods and that maintenance agreement could contain some form of guarantee.<sup>170</sup> However, in the usual case it will be a matter of construction as to whether there is a contract. When a consumer knows about a guarantee beforehand a collateral contract may be formed with the manufacturer,

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(169) In the United Kingdom such a clause would fall foul of the Unfair Contract Terms Act 1977 in that a term excluding or restricting liability for misrepresentation may be adjudged 'unreasonable'; see section 8 of that Act. Similarly, in the United States a court may refuse to give effect to a guarantee which purports to take away the consumer's rights to sue for breach of warranty, etc; see *Henningsen v Bloomfield Motors* 32 NJ 358. The Contracts and Commercial Law Reform Committee, Working Paper on Warranties in the Sale of Consumer Goods (1977), para 23k, recommends that express guarantees given by manufacturers or other suppliers of goods should not exclude or limit the express or implied warranties otherwise created by law or the buyers right to claim damages etc.

(170) See Mickelburgh, Consumer Protection (1979), 234.

the consideration for which is entering into the main contract with the retailer.<sup>171</sup> Guarantees are normally framed in such a way as to evidence an intention to create legal relations and this will facilitate a finding that an offer was made which the consumer accepted when contracting with the retailer. However, where the consumer is not aware of the existence or contents of a guarantee at the time of purchase then the aforementioned argument must collapse.<sup>172</sup> In this situation it may be argued that the consumer subsequently accepts the offer as represented by the guarantee when he, for example, sends off the guarantee card to the manufacturer. The difficulty here is in finding consideration as it is well established that past consideration is insufficient to support a contract. It has been suggested that the goodwill, information etc. which the manufacturer gets when the consumer sends off the guarantee card is a benefit which constitutes the consideration.<sup>173</sup> There being a complete absence of authority on the subject of guarantees<sup>174</sup> their legal effect remains a matter for speculation and determination from basic principles of contract law; however, it is as well to bear in mind that a manufacturer may exclude potential liability for misrepresentations in advertisements by including an appropriate exclusion clause in his guarantee.

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(171) See Collateral Contracts, supra.

(172) See *R v Clarke* (1927) 40 CLR 227, 241; Treitel, op. cit., 26. A person cannot accept an offer of which he is ignorant.

(173) See Rees, 'Legal Effect of Manufacturer's Guarantees', (1960) 104 Solicitors Journal 879.

(174) See the comments of Cusine, op. cit., 185.

## 2. TORTIOUS REMEDIES

### (1) NEGLIGENCE

As mentioned above<sup>175</sup> liability for negligent misrepresentations made to the consumer by or on behalf of another contracting party fall to be determined by reference to the Contractual Remedies Act 1979.<sup>176</sup> However, where a negligent misstatement is made in an advertisement or other communication emanating from a manufacturer (or some other third party such as a national distributor or wholesaler) that persons potential tort liability for negligence remains.

Ever since the famous decision in *Donoghue v Stevenson*<sup>177</sup> personal injury and damage to property have been compensatable in a negligence action against a manufacturer of a defective product.<sup>178</sup> In that *locus classicus* in the law of torts, Lord Atkin observed:

"A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation and putting up of the products will

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(175) *Supra*, at 107.

(176) S 6.

(177) [1932] AC 562.

(178) Of course, the Accident Compensation Act 1972, section 5(1), excludes the possibility of claims for damages for personal injury or death being brought in New Zealand independently of the Act.

result in an injury to the consumer's life or property, owes a duty to that consumer to take that reasonable care." 179

Similarly, there has been little difficulty<sup>180</sup> in allowing recovery for physical loss in the case of negligent misstatements. For example, in *Watson v Buckley and Osborne*<sup>181</sup> a distributor extensively advertised a hair dye in the *Hairdressers' Weekly Journal* in the following terms

"Mark your next hair dye order 'Melereon' the safe harmless hair dye ... [this preparation] has no ifs or buts; is a hair dye that will not harm the most sensitive skin, the hair dye that positively needs no preliminary tests."

The advertisement was shown by a professional hairdresser to the plaintiff who, in reliance thereon, requested the hairdresser to use it on his hair. However, the hair dye contained an excessive quantity of acid from which the plaintiff contracted dermatitis. Stable J held the distributor liable in negligence for the plaintiff's injuries. The learned judge held:

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(179) *Ibid*, at 599. See, for example, *Grant v Australian Knitting Mills* [1936] AC 85; *Cathcart v Hull* [1963] NZLR 333; *Diamante Sociedad De Transportes SA v Todd Oil Burners Ltd* [1966] 1 Lloyd's Rep. 179. Note that this dissertation is concerned with false or misleading advertising and other misstatements inducing the purchase of goods etc with the result that only peripheral consideration will be given to that vast body of tort law which has developed to impose liability on manufacturers and distributors of defective products.

(180) See the reservations expressed by Asquith LJ in *Candler v Crane Christmas & Co* [1951] 2 KB 164, for example.

(181) [1940] 1 All ER 174.



"Last, but by no means least, this commodity, of which they knew singularly little, and in connection with which they had taken no steps whatever to ensure that the deliveries of the commodity were in accordance with the stipulated article, was put out to the trade and to the world as being the hair dye which, in contradistinction to every other hair dye, was absolutely safe and harmless, could not harm the most sensitive skin, and positively needed no preliminary tests... . That, in my judgement, was carelessness. Before committing their name to such an assertion to all and sundry, they should have taken far greater care to ensure that that assertion was based on solid ground." 182

However, for a considerable time the law clung to a distinction between negligent statements which result in danger to life, to limb, to health and property, and misstatements which did not have such physical effects.<sup>183</sup> In the landmark case of *Hedley Byrne and Co Ltd v Heller and Partners Ltd*<sup>184</sup> the House of Lords recognised that such a distinction was illogical<sup>185</sup> and determined that in

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(182) Ibid, 181. See also *Lambert v Lastoplex Chemicals Co Ltd* (1971) 25 DLR (3d) 121 (Supreme Court of Canada); *Lem v Barotto Sports Ltd* (1976) 69 DLR (3d) 276; *Labrecque v Saskatchewan Wheat Pool* (1977) 78 DLR (3d) 289; *Clayton v Woodman & Sons Ltd* [1962] 2 QB 533.

(183) See, for example, the remarks of Cohen LJ in *Candler v Crane Christmas & Co*, *supra*, 197. By categorising the cost of making dangerous products safe as physical damage, such preventive loss has been held recoverable in New Zealand, the United Kingdom and Canada. See, for example, *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 414; *Anns v Merton London Borough Council* [1978] AC 728, 760; *Fuller v Ford Motor Co* (1979) 94 DLR (3d) 127.

(184) [1964] AC 465.

(185) See, for example, the speech of Lord Morris (at 496); In the recent case of *Junior Books Ltd v The Veitchi Co Ltd*, "The Times" 17 July 1982, Lord Roskill pointed out that 'it was sometimes overlooked that virtually all damage, including physical damage, was in one sense economic since it was compensated by an award in damages'.

appropriate circumstances damages in respect of economic or financial loss could be recovered for negligent misstatements. The House of Lords were willing to import a duty of care in

"all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave information or advice when he knew or ought to have known that the inquirer was relying on him." 186

The appellants in this case had a contract with a company called Easipower Ltd but had doubts as to the creditworthiness of this company. Consequently they asked their bankers to get in touch with the respondents, who were Easipower's bankers, and to inquire into Easipower's financial position. The respondents provided favourable information 'in confidence' and 'without liability'. Easipower Ltd subsequently went into liquidation and the appellants, who had acted in reliance upon the information received, sustained considerable financial losses. It is clear from the speeches in the House of Lords that a duty to be careful arises from an undertaking, express or implied, by a person to give information or advice, even though gratuitous, provided a special relationship between the parties exists. However, in an action to recover damages in negligence from the respondents it was held

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(186) Ibid, 486 (per Lord Reid).

that even if the bankers owed a duty of care to the appellants,<sup>187</sup> the respondents in this case had expressly disclaimed responsibility and so could not be held liable.

The question that arises in the context of this dissertation is as follows: Where a manufacturer (or some other party such as a national distributor or wholesaler) has made negligent misstatements in advertising or other material disseminated by him and the consumer has been induced in reliance thereon to enter into a contract with a retailer, can the consumer recover damages from the manufacturer for economic or financial loss? Or as Cane<sup>188</sup> puts it:

".... (T)he manufacturer may by his advertising and representations as to the quality of the product create certain expectations in the consumer as to its quality. Why should he not be liable for the disappointment of these expectations on the basis of some sort of liability for misstatements. If the misstatements were intentional then an action in deceit would be a real possibility<sup>189</sup>... If the misstatement were negligent then some extension of *Hedley Byrne* principles would be needed to meet the case."

The consumer in his endeavours to secure compensation from a manufacturer in such circumstances would have to surmount formidable obstacles.

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(187) Lords Morris and Hodson thought that a banker in such circumstances only owed a duty to be honest as distinct from being careful; *ibid*, 504, 513.

(188) 'Physical Loss, Economic Loss and Products Liability', (1979) 95 LQR 117, 139.

(189) See the discussion on Deceit, *infra*.

First, the consumer must establish that there is a 'special relationship' between the parties; that is, on *Hedley Byrne* principles it is not every careless statement causing economic loss that will attract liability. In *Mutual Life and Citizens Assurance Co Ltd v Evatt*<sup>190</sup> the nature of this special relationship was discussed and the majority of the Privy Council<sup>191</sup> were of the opinion that liability on *Hedley Byrne* principles should attach only to persons who are in the business of supplying information or advice or let it be known that they claim to possess the necessary skill to so inform or advise. Lords Morris and Reid dissented in that they thought it was undesirable to limit the scope of the duty in this fashion and felt that a legal duty to take such care as is reasonable in the circumstances of the case should arise where advice is given on a business occasion or in the course of the adviser's business activities.<sup>192</sup> In this case a policyholder in the appellant insurance company sought its advice as to the financial position of another company which was owned by the appellant. The appellant carelessly gave favourable information which resulted in the policyholder losing money. The appellant was held not liable, in that the majority of the Privy Council refused to accept

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(190) [1971] AC 793.

(191) *Ibid*, 806 (per Lord Diplock).

(192) *Ibid*, 811.

that the mere giving of careless advice, even with knowledge that the inquirer intends to rely on it, gives rise to liability.

Heuston and Chambers<sup>193</sup> criticise this decision for they argue that 'it is very difficult to see how a company can authorise the giving of such advice except as part of its business activities', and in subsequent decisions a more liberal approach has been adopted as to what constitutes a sufficiently proximate relationship. For example, in the recent case of *Shaddock (L) & Associates Pty Ltd v Parramatta City Council*<sup>194</sup> the majority of the High Court of Australia clearly were opposed to confining liability for negligent misstatements causing economic loss to those cases falling within the ambit of the rule proposed in *Evatt's* case. Gibbs CJ stated that

"... I find it difficult to see why, in principle, the duty should be limited to persons whose business or profession includes giving the sort of advice or information sought and to persons claiming to have the same skill and competence as those carrying on such a business or profession, and why it should not extend to persons who, on a serious occasion, give considered advice or information

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(193) Salmond and Heuston on the Law of Torts (18 ed, 1981), 195.

(194) (1981) 36 ALR 385.

concerning a business or professional transaction." 195

Similarly, *Evatt's* case has not been supported in subsequent English decisions<sup>196</sup> where it has been accepted that where a person who, being possessed of special knowledge or means of knowledge, undertakes to impart information to another, and is aware that the other will act in reliance upon that information, that person is not in a different position from a person who brings, or professes to bring, professional skill or knowledge into the provision of such information. Smillie<sup>197</sup> points out that the strictures imposed in *Evatt's* case on the application of *Hedley Byrne* principles have been evaded on numerous occasions in New Zealand<sup>198</sup> and it may be that a

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(195) *Ibid*, 391-392; see also the judgements of Murphy J (at 409); Mason J (at 404-405); and Aicken J (at 410); compare the judgement of Stephen J (at 396-398).

(196) See, for example, *Esso Petroleum Co Ltd v Mardon* [1976] QB 801; *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] 1 QB 574.

(197) 'Liability for Negligent Misstatements; Continuing Uncertainty', (1976) 3 Otago Law Review 513.

(198) See, for example, *Day v Ost* [1973] 2 NZLR 835 (imputation of a financial interest to the adviser bringing the case within the formula suggested by Lord Diplock in *Evatt's* case (at 809) that the normal requirements for a duty may not have to be satisfied in such circumstances); *Bernadine Fisheries Ltd v Allan* [High Court, Christchurch, 15 April 1975; A 132/70] (very wide view taken as to when, in terms of *Evatt's* case, a person practising one of the traditional professions 'is carrying on the profession' of giving advice); *Capital Motors Ltd v Beecham* [1975] 1 NZLR 577 (this wide approach applied to businessmen who were not engaged in the practice of the traditional professions ie, to a motor vehicle dealer); *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394 (classification of economic loss consequential on physical damage, as physical); cf. *Plummer-Allinson v Spencer L. Avery Ltd* [1976] 2 NZLR 254 (restrictive literal interpretation of the majority in *Evatt's* case); *Gartside v Sheffield Young & Ellis* [High Court, Auckland, 15 September 1981; A 438/80].

New Zealand court would be prepared to hold that a manufacturer in extolling the virtues of his product is in the business of supplying information or at least lets it be known that he possesses the necessary skill to so inform.

Even if the consumer satisfies the court that the restrictive approach in *Evatt's* case does not exclude a manufacturer from the range of defendants who may be liable on *Hedley Byrne* principles, the consumer must demonstrate that he falls within the class of potential plaintiffs. Is there, therefore, a sufficiently proximate relationship between a manufacturer and a consumer such that in the reasonable contemplation of the manufacturer carelessness on his part may be likely to cause damage to the consumer. In *Anns v Merton London Borough Council*,<sup>199</sup> Lord Wilberforce outlined a two stage inquiry necessary to establish that a duty of care arises, namely:

"First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach may give rise."

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(199) [1978] AC 728, 751-752.

In *Scott Group Ltd v McFarlane*<sup>200</sup> the respondent chartered accountant prepared company accounts for a public company, John Duthie Holdings Ltd. In reliance upon these accounts, the appellants formulated a take-over bid. The appellants sued the respondents for negligence 'in the examination and audit by them of the consolidated accounts' claiming damages representing the amount paid in excess of the alleged value of the shares. Richmond P declined to accept the appellants argument in that he held that cases upholding liability of accountants or auditors to third parties all involved a greater degree of proximity between the parties than mere foreseeability of reliance.<sup>201</sup> Mere foreseeability of the general possibility of a take-over bid was not sufficient to give rise to a 'special relationship'. However, Woodhouse J, in adopting the statement of Lord Wilberforce in *Anns v Merton London Borough Council*,<sup>202</sup> considered that the accountants owed a duty 'to those persons whom they can reasonably foresee will need to use and rely upon [the company accounts] when dealing with the company or its members in significant matters affecting the company

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(200) [1978] 1 NZLR 553. See also *J.E.B. Fasteners Ltd v Marks, Bloom & Co* [1981] 3 All ER 289.

(201) That is; *Haig v Bamford, Hagan, Wicken and Gibson* (1976) 3 WWR 331; *Ultramares Corporation v Touche* 255 NY 170 (1931); *Dimond Manufacturing Co Ltd v Hamilton* [1969] NZLR 609.

(202) Supra.



assets and business'.<sup>203</sup> Cooke J. while emphasising that he was not just applying a simple test of foreseeability of reliance, considered that there was a sufficient degree of proximity to give rise to a *prima facie* duty of care as the evidence disclosed 'a plain risk of a take-over and the virtual certainty that in such an event the accounts would be relied upon by an offeror'.<sup>204</sup> Johnston<sup>205</sup> comments that in practice 'Woodhouse J's reasonable foreseeability and Cooke J's probability or likelihood of reliance may ... cover much the same ground' because Woodhouse J attached some significance to the fact that it was a take-over transaction where reliance on the accounts was to be expected. That writer further contends that the 'robust view' adopted by Woodhouse and Cooke JJ in this case towards the special relationship concept espoused in *Evatt's* case is significant, for if a similar attitude is taken in relation to other aspects of the special relationship concept when they arise for consideration, *Evatt's* case should not prove the brake on development which some cases have assumed it to be.<sup>206</sup>

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(203) *Ibid*, 575.

(204) *Ibid*, 582.

(205) 'Negligent misstatement - Auditors Liability to Third Parties for Careless Report on Company's Annual Accounts', (1978) 8 NZULR 175, 181.

(206) *Ibid*, 187. See also *Barrett v Dalgety New Zealand Ltd* [1979] NZ Recent Law 199; *Rutherford v Attorney-General* [1976] 1 NZLR 403, where a similar 'robust' approach is adopted.

If a simple test of foreseeability of reliance *vis-a-vis* a manufacturer's liability for negligent misstatements causing economic loss to a consumer were applied there would be no difficulty in establishing a *prima facie* duty of care. A manufacturer in publishing advertisements about his product intends to promote the sale of the product and statements made in the advertisements are designed to achieve this object; he must contemplate and foresee as a very real possibility that careless misstatements would result in economic loss to consumers who in reliance thereon are induced to purchase the product which does not come up to advertised expectations. However, it is submitted that on the present state of authority the chances of a consumer recovering damages are highly unlikely, for the following reasons:

(i) The overwhelming majority of cases are concerned with situations where the adviser has given information or advice to some readily identifiable person of which the adviser is, or ought to be, aware.<sup>207</sup> To hold a manufacturer liable for negligent misstatements causing economic

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(207) Todd, 'Negligence, Economic Loss and the Ambit of the Duty of Care', (1980) 1 Canterbury Law Review 29, 32 points out that "... there has in fact been direct contact, or at least contact through an agent, in most of the reported cases. For example, bankers and persons enquiring as to the credit of customers, estate agents and prospective purchasers of land, parties to pre-contractual negotiations and professional persons and their clients have all been held to constitute relationships giving rise to a duty of care". See also the comments of Mason J in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1977) 11 ALR 227, 274-275.

loss where he was able to foresee loss to consumers in general entails the risk of liability to an indeterminate number of persons, and to recognise such liability could well open the floodgates.<sup>208</sup>

(ii) The majority view in *Evatt's* case may be against the imposition of liability in such circumstances, and until such time as the House of Lords makes a definitive pronouncement to the contrary,<sup>209</sup> or the Privy Council itself departs from its previous position, New Zealand courts are constrained by rules of precedent to adhere to this restrictive approach<sup>210</sup> - notwithstanding attempts made to evade the case.

(iii) The leading case in New Zealand on liability to third parties, that is, *Scott Group Ltd v McFarlane*,<sup>211</sup> does not offer much comfort to the consumer. Even Woodhouse J who applied a test of reasonable foreseeability

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(208) Relevant to policy considerations; see (iv), infra.

(209) Where a Privy Council decision and subsequent decision of the House of Lords are in conflict, a New Zealand court may follow the House of Lords decision 'where the House of Lords has made it plain and in what respects error arose in the earlier case so that it would seem wholly unlikely that there could be any reversion to the earlier decision'; per Cleary J in *Corbett v Social Security Commission* [1962] NZLR 878, 915 (CA).

(210) English courts and the High Court of Australia are not so constrained. See, for example, *Esso Petroleum Co Ltd v Mardon*, supra; *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd*, supra; *Shaddock (L) & Associates Pty Ltd v Parramatta City Council*, supra.

(211) Supra.

thought that a line could be drawn between the appellant in that case and an investor who relied upon 'some newspaper or stock exchange' reference to the company's accounts.<sup>212</sup>

(iv) Furthermore, even if the consumer satisfies the court that there is a sufficient relationship of proximity, policy considerations may dictate that no liability is imposed.<sup>213</sup>

One policy argument is that by restricting liability to that class of persons identified in the majority judgement in *Evatt's* case, liability is restricted to those who are best able to afford it. However, in *Shaddock's* case, Mason J stated:

"There are several reasons why this policy consideration should not be regarded as paramount. In the first place, it denies a remedy to those who sustain serious loss at the hands of those who are not members of the class and whose conduct is negligent. Secondly, it ignores the availability of insurance as a protection against liability. Thirdly, there is no logic in excluding from the class of persons liable for negligent misstatement persons who,

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(212) *Supra*, at 575.

(213) Lord Wilberforce observed that even if there is a prima facie duty of care 'it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise' *Anns v Merton London Borough Council*, *supra*, at 751-752; see also *Junior Books Ltd v The Veitchi Co Ltd* "The Times", 17 July 1982; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA). In both these cases the House of Lords and New Zealand Court of Appeal, respectively, proceeded on the basis that the principles outlined by Lord Wilberforce were the best guide to a court faced with determining the existence or otherwise of a duty of care.

though they may not exercise skill and competence, assume responsibility to give advice or information to others on serious matters which may occasion loss or damage. Finally, the rule, recently established by *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* ..., is that economic loss, not consequential upon property damage, may be recoverable from those whose negligence occasions it." 214

It is submitted, with respect, that these reasons are compelling and convincing ones if "justice" to the consumer is the sole consideration. In particular, a manufacturer is in an excellent position to distribute any loss through the pricing of his products; or, alternatively, may add the cost of any additional insurance cover to his present product costs, and price the product accordingly. His liability in respect of direct economic loss<sup>215</sup> would be for a foreseeable determinate sum; namely, the costs of repair or replacement. The position as regards consequential economic loss<sup>216</sup> is

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(214) Supra, at 405.

(215) Smillie, 'Liability of Builders, Manufacturers and Vendors for Negligence' (1978) 8 NZULR 109, 117, defines direct economic loss as 'the out of pocket loss or loss of bargain to the purchaser caused by the defect causing damage to the product itself or rendering the product unfit for its normal intended purposes'.

(216) Smillie, ibid, 117, defines consequential economic loss as including 'all other indirect loss such as loss of profits from inability to use the defective product'. For example, the consumer may have to bear the cost of alternative transport while defects in his vehicle are rectified.

less clearcut in that the calculation of amount involved would be impossible; however, this is not to suggest that no insurance could be effected in respect of such loss, but developments in the area of professional indemnity insurance point to the type of difficulties involved.<sup>217</sup> While insurance may provide the answer for the manufacturer, caution must be exercised lest the cost of the remedy exceed the benefit of the cure. In return for an action to recover economic loss in respect of negligent misstatements inducing the purchase of safe but defective products, the consumer body in general will have to pay more for products and there may, therefore, be cogent economic considerations dictating that liability should be negatived. A second policy consideration to be weighed in the balance is that outlined by the Supreme Court of Canada in *Rivtow Marine Ltd v Washington Iron Works Ltd*,<sup>218</sup> where Ritchie J, delivering judgement for the majority said:

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(217) Chiefly, the difficulty is ascertaining the degree of risk involved. See Sutton, Insurance Law in Australia and New Zealand (1980), 66-67. Due to the difficulty in assessing the risk, premiums payable in respect of professional indemnity insurance are high, and the same consideration could dictate heavy premiums in respect of insurance by manufacturers against consequential economic loss.

(218) (1973) 40 DLR (3d) 530.

"... the liability for the cost of repairing damage to the defective article itself and for the economic loss flowing directly from the negligence is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract." 219

That is, damages for inferior quality should be recoverable only in contract as between the immediate parties<sup>220</sup> because the true extent of the loss depends upon the nature of the agreement reached between the parties to the sale.<sup>221</sup> As Todd<sup>222</sup> mentions 'this is fundamentally the same argument that prevailed in *Winterbottom v Wright*<sup>223</sup> in the context of physical harm and which was decisively overturned in *Donoghue v Stevenson*'<sup>224</sup> and recent decisions imposing concurrent duties in contract and tort support the contention that the fact that goods are produced pursuant to a contract between a manufacturer and retailer, for example, does not exclude the possibility of the same production giving rise to tortious obligations owed to the consumer. In any event recent developments suggest that

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(219) *Ibid*, 541.

(220) That is, manufacturer and retailer, retailer and consumer, respectively.

(221) See Smillie, 'Liability of Builders, Manufacturers and Vendors for Negligence', *loc. cit.*, 117-118; see also *Gartside v Sheffield, Young & Ellis* [High Court, Auckland, 15 September 1981; A 438/80], at pages 24-27.

(222) *Op. cit.*, 50.

(223) (1842) 10 M & W 109.

(224) See, for example, *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554; *Ross v Caunters* [1979] 3 All ER 580; cf. *MacLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA); *Marlborough Properties Ltd v Marlborough Fibre Glass Ltd* [1981] 1 NZLR 464 (CA); Sutton and Mulgan, 'Contract and Tort' [1980] NZLJ 366.

the trend is to make manufacturer s liable in contract for breach of the traditional implied warranties in contracts for the sale of goods<sup>225</sup> and if this development is mirrored in New Zealand<sup>226</sup> difficulties associated with establishing liability for negligent misstatement causing economic loss may be obviated.

Finally, it may be argued that attributing liability to a manufacturer for negligent misstatement inducing the purchase of 'safe but shoddy',<sup>227</sup> goods could expose the manufacturer to liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.<sup>228</sup> As regards 'indeterminate amount' it has already been mentioned that in respect of direct economic loss liability is for a foreseeable determinate sum (namely, the costs of repair or replacement) and it is only in respect of consequential economic loss that this consideration may carry much weight. However, in consumer transactions this consequential economic loss is not likely to be great<sup>229</sup>

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(225) See, for example, the Trade Practices Act 1974 (Australia), s 74; the Consumer Products Warranties Act 1978 (Saskatchewan), s 16; see brief discussion, *infra*, at 156-158.

(226) See Contracts and Commercial Law Reform Committee, Working Paper on Warranties in the Sale of Consumer Goods (1977); see brief discussion, *infra*, at 156-158.

(227) This expression was used by the English and Scottish Law Reform Commission in their report on Liability for Defective Products, (1977, Cmnd 6831). The phrase 'safe but shoddy' was used to refer to goods which fail to meet the consumers' reasonable expectations; that is, those that cause purely economic losses.

(228) Per Cardozo CJ in *Ultramares Corpn v Touche, Niven and Co* 174 NE 441 (1931).

(229) See Tobin, 'Products Liability: Recovery of Economic Loss', (1970) 4 NZULR 36, 43.



and the general requirement that such loss be reasonably foreseeable and be the direct consequence of a failure in the duty of care provides a ready check to burgeoning damages claims.<sup>230</sup> As regards the 'indeterminate time' argument, the nature of the manufacturer's own assertions will dictate this issue. If the manufacturer negligently advertises that his product will 'last for at least five years' he cannot be heard to complain if defects arise within this period and he is held liable to pay damages in respect of his negligent misstatement. Of course, as time elapses, so does the difficulty increase for a consumer to demonstrate that responsibility for the defect rests with the manufacturer and is not attributable to some intervening cause.<sup>231</sup> Finally, on the question of liability to an 'indeterminate class', Todd<sup>232</sup> observes

"Multiple liability can and does occur in the case of dangerous products and that has never been seen as a reason for denying liability. Nor should it in the case of shoddy goods."

However, policy considerations may dictate that where loss of expectations is at stake, as opposed to consumer safety, no liability should be imposed. It seems clear that the

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(230) See, for example, the comments of Edmund Davies LJ (as he then was) in *Spartan Steel and Alloys Ltd v Martin and Co (Contractors) Ltd* [1973] 1 QB 27, 45.

(231) See, for example, *Phillips v Chrysler Corporation of Canada Ltd and Roxburgh Motors Ltd* (1962) 32 DLR (2d) 347.

(232) Op. cit., 51.

consumer's safety must be the paramount concern and his economic welfare is of secondary importance.

In conclusion, therefore, it is submitted that the prospects of a consumer recovering damages for economic or financial loss from a manufacturer where he has been induced to enter into a contract with a retailer in reliance on negligent misstatements made by the manufacturer in advertising etc, are very poor. The obstacle that there be a sufficient relationship of proximity appears insurmountable at the present time in New Zealand, and policy considerations may dictate that even if this obstacle is overcome through a liberal approach as to what constitutes the desired 'special relationship', that liability be denied. However, it is worth mentioning that recent developments making manufacturers subject to the traditional implied warranties in contracts for the sale of goods<sup>233</sup> may go a considerable distance towards alleviating the plight of consumers. For example, the Trade Practices Act 1974,<sup>234</sup> rather than making manufacturers of consumer products liable in tort, deems manufacturers to give to consumers of their products an implied undertaking that the goods correspond with their description or sample,

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(233) See the Sale of Goods Act 1908, ss 15, 16; the Hire Purchase Act 1971, ss 12-14.

(234) As amended by the Trade Practices Amendment Act 1978 (Australia).

and are of merchantable quality and fit for the purpose for which they are required.<sup>235</sup> There are no limitations imposed on the type of losses a consumer may recover from a manufacturer<sup>236</sup> with the result that damages for economic loss may be recoverable. A similar approach is adopted in the Consumer Products Warranties Act 1978 in Saskatchewan<sup>237</sup> and the Contracts and Commercial Law Reform Committee of New Zealand<sup>238</sup> have suggested that manufacturers should be directly accountable to consumers of goods by reference to a standard of 'ordinary acceptability',<sup>239</sup> and suggest that a warranty of such acceptability should be implied by statute into all consumer sales. Consequently, the consumer who purchases goods that are not acceptable by reference to 'any statement, description or promise applied to them' may bring an

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(235) See section 74.

(236) See, however, section 74L concerning non-consumer goods.

(237) See Romero, 'The Consumer Products Warranties Act', (1978-79) 43 Saskatchewan Law Review 81.

(238) Working Paper on Warranties in the Sale of Consumer Goods (1977).

(239) The Committee suggest (at 13) that 'Goods should be acceptable in accordance with the new Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any statement, description or promise applied to them, their age, the presence of defects of which, at the time of the sale, the buyer had actual knowledge, and all other relevant circumstances including the price at which they were sold'. (The underlining is my own.)

action against the manufacturer whose advertising claims have created an undeservedly high level of expectation in respect of the product. Consideration of implied terms in contracts for the sale of goods lies outside the ambit of this dissertation, but it must be born in mind that legislative acceptance of the Committee's recommendations will facilitate greatly consumer redress *vis-a-vis* the manufacturer.

## (2) DECEIT

Where a manufacturer (or some other person such as a national distributor) knowingly makes a false representation as regards his goods to a consumer with the intent that he should enter into a contract for the purchase of those goods from a retailer, and the consumer acting in reliance upon the representation suffers damage, the manufacturer may be liable to the consumer in the tort of deceit.<sup>240</sup> Lord Maugham<sup>241</sup> identifies four main ingredients of this tort: (1) There must be a false representation of fact; (2) The representation must be made with the knowledge of its falsity; (3) It must be

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(240) See *Pasley v Freeman* (1789) 3 TR 51; *Derry v Peek* (1889) 14 App Cas 337; *Public Trustee v Guardian Trust and Executors Co (NZ) Ltd* [1939] NZLR 613 (CA); Heuston and Chambers, *op. cit.*, 365; Winfield & Jolowicz on Tort (11 ed, 1979), 246.

(241) *Bradford Building Society v Borders* [1941] 2 All ER 205, 211.

made with the intention that it should be acted upon by the consumer, or by a class of persons which includes the consumer, in the manner which resulted in damage to him; (4) It must be proved that the consumer has acted upon the false statement, and has sustained damage by so doing.

*First*, the consumer must prove a false representation of fact. As the discussion of misrepresentation in the context of the Contractual Remedies Act 1979 revealed, this may be a difficult task. Where the representation amounts to mere puffery or exaggeration, unaccompanied by any particular or definite statement of fact, such a representation obviously will not ground an action in deceit.<sup>242</sup> Given that the purpose of advertising is to promote the sale of goods and services, the advertiser in the overwhelming majority of cases will concentrate on the positive features of the product or service. However, many consumer complaints will relate to what was not pointed out in an advertisement; namely, the negative characteristics of the product or service. The general rule here is: 'No mere silence will ground the action of deceit'.<sup>243</sup> However, this rule is subject to certain qualifications. For instance, although a statement may contain nothing actually false, it may be 'such a partial

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(242) See *supra*, at pages 97-106.

(243) *Arkwright v Newbold* (1881) 17 Ch. D. 301, 318.

(244) See *supra*, at pages 97-106.

and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false'.<sup>244</sup> In *Awaroa Holdings Ltd v Commercial Securities and Finance Ltd*<sup>245</sup> the defendant company produced a brochure in respect of a shopping arcade which it had constructed and indicated in this brochure, amongst other things, that there were 11 subleases granted by the defendant in respect of shops in the arcade at the rentals set out in the brochure. The plaintiff in reliance upon this representation and others purchased the leasehold interest in this arcade. After settlement the plaintiff discovered that 7 out of the 11 tenants had made an arrangement to pay only half the legal rental. In granting rescission of the contract on the ground of fraud, Perry J observed that the omission to state this qualification in respect of rental actually payable made that which was stated absolutely false. Consequently, the advertiser, in extolling the virtues of a product or service, must be mindful of the proposition that a *suppressio veri* may amount to a *suggestio falsi* which will ground an action in deceit.

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(244) *Peek v Gurney* (1873) LR 6 HL 377, 403; per Lord Cairns. Similarly in *Gluckstein v Barnes* [1900] AC 240, 250 Lord Macnaghten said: 'Everybody knows that sometimes half a truth is no better than a downright falsehood'.

(245) [1976] 1 NZLR 19.

*Second*, the consumer must prove that the statement was made with knowledge of its falsity or recklessly.

"Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." 246

The test therefore is a subjective one; that is, whether the maker of the statement had an honest belief in the truth of the statement complained of.<sup>247</sup> Where it is argued that the statement was made recklessly it must be shown that, without knowing whether his statement is true or false, the maker was consciously indifferent whether it was true or false.<sup>248</sup> Negligence, no matter how gross, can never in itself constitute fraud, although it may evidence an absence of an honest belief in the truth of the statement.<sup>249</sup>

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(246) *Derry v Peek*, *supra*, 374; per Lord Herschell.

(247) In *Akerhielm v De Mare* [1959] AC 789, 805, Lord Jenkins, delivering the judgement of the Privy Council, stated: 'The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration or its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made'. (The emphasis is my own.)

(248) Winfield and Jolowicz on Tort, *op. cit.*, 253; *Armstrong v Strain* [1951] 1 TLR 856, 871; *Redican v Nesbitt* (1924) 1 DLR 536.

(249) *Derry v Peek*, *supra*, 275; *R v Myers* 1948 (1) SA 375 (AD) where Greenberg JA (at 384) remarked that 'the maxim culpa lata dolo aequiparatur cannot be applied on the question of absence of honest belief'.

*Third*, the false statement must be made with intent that the consumer should act in reliance on it in the manner in which he did.<sup>250</sup> Satisfaction of this requirement should not occasion any difficulty in the advertising context as it is abundantly clear that the very purpose of advertising is to promote sales; therefore, if a consumer acting in reliance upon a false statement in an advertisement goes out and purchases the advertised product or service, it would seem that this requirement is fulfilled.<sup>251</sup> The advertiser may not escape liability by arguing that the consumer was foolish or negligent to rely upon the misrepresentation or had an opportunity to verify the accuracy or otherwise of any claim made.<sup>252</sup> Where a representation is capable of bearing two meanings, one of which is true and the other false, the consumer must show that he acted upon it in the sense in which it was false and that the advertiser intended it to be understood in this sense.<sup>253</sup> As

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(250) In *Tait v Wicht* (1890) 7 SC 158, 174, De Villiers CJ stated that: 'A mere lie, which is foolishly acted upon by others to whom it is addressed, does not constitute a fraud, in the legal sense of the term, unless the utterer intended or must from the mode and circumstances in which he uttered it, be presumed to have intended that it should be acted upon'.

(251) Generally, see *Andrews v Mockford* [1896] 1 QB372 (actionable fraudulent misrepresentation may be made to the public at large); *Commercial Banking Co v Brown* (1972) 126 CLR 337 (plaintiff need not have been aimed at as a specific individual).

(252) *Nocton v Ashburton* [1914] AC 932, 962; *Central Railway of Venezuela v Kisch* (1867) LR 2 HL 99.

(253) *Angus v Clifford* [1891] 2 Ch 499, 472; *Akerhielm v De Mare*, supra, 805.



Williams<sup>254</sup> contends

".... (H)owever reasonable the [consumer] was in attaching the untrue meaning to the [advertiser's] statement, if the [advertiser] did not intend his words to be taken in that sense, there is no deceit because there is no guilty mind." 255

It is submitted, therefore, that Perry J<sup>256</sup> was incorrect in contending that 'what the representor professes to have meant or intended when making (a statement) is wholly immaterial'. However, where the meaning placed by the advertiser on the representation is so far removed from the natural, customary and ordinary meaning of the words used, the advertiser would be hard pressed to persuade a court that he honestly understood the representation to bear the meaning claimed by him.<sup>257</sup>

*Fourth*, the consumer must prove that he has suffered damage in consequence of acting upon the statement. Provided the consumer can prove that he was influenced by the advertisement in entering into a contract with a retailer or supplier of services,<sup>258</sup> he may recover for his 'out of pocket' loss<sup>259</sup> and, in appropriate circumstances, his consequential loss.<sup>260</sup>

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(254) 'Language and the Law', (1945) 61 LQR 384.

(255) *Ibid.*, 392.

(256) *Awaroa Holdings Ltd v Commercial Securities and Finance Ltd*, *supra*, 31.

(257) *Smith v Chadwick* (1884) 9 App. Cas. 187, 201; *Akerhielm v De Mare*, *supra*, 805.

(258) *MacLeay v Tait* [1906] AC 24; *Horwood v Statesman Publishing Co Ltd* (1929) 1 41 LT 54, 58.

(259) See, for example, *Canavan v Wright* [1957] NZLR 790; *New Zealand Refrigerating Co Ltd v Scott* [1969] NZLR 30.

(260) See, for example, *Mullett v Mason* (1866) LR 1 CP 559; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Foster v Public Trustee* [1975] 1 NZLR 26.

It is submitted that this tort remedy is of limited use to consumers for two reasons in particular. First, the consumer is faced with the difficulty of pointing to an unambiguous statement of fact in an advertisement (or, for that matter any other communication) that is false. A characteristic feature of much advertising is its ambiguity and vagueness and this, coupled with the latitude allowable for "puffing" and exaggeration makes it very difficult to 'pin down' false statements of fact. Much advertising through imagery and psychological appeals will simply create a favourable impression in respect of a particular product or service that will encourage the purchase thereof. Second, the majority of consumers would be hard pressed to establish the element of *scienter* and even gross negligence will not suffice unless it can be shown that the advertiser was consciously indifferent to the truth.

### (3) BREACH OF STATUTORY DUTY

Where a statutory duty is imposed upon a person and that duty is broken an action in tort may, in appropriate circumstances, be brought by a person who is injured thereby.<sup>261</sup> Before turning to a consideration of the relevant legislation in the area of advertising and

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(261) Generally, see Winfield & Jolowicz on Tort, op. cit., 154; Salmond and Heuston on the Law of Torts, op. cit., Fleming, The Law of Torts (5 ed, 1977), 122; Fricke, 'The Juridical Nature of the Action upon the Statute', (1960) 76 LQR 240; Williams, 'The Effect of Penal Legislation in the Law of Tort', (1960) 23 MLR 233.

disclosure of information in New Zealand, it is proposed to outline the elements that must be present before such a breach may found a civil action. To entitle a person to sue for breach of a statutory duty he must show that (1) the intention of Parliament in creating the duty was to give such a right of action; (2) he was one of the persons for whose benefit the duty was imposed; (3) the damage was of the kind contemplated by the statute; (4) the defendant is guilty of a breach of his statutory obligation; and (5) the defendant's breach has caused the damage.

*First*, it must be shown that the statute was intended to give a right of action. Where the statute addresses itself to this question no difficulty arises,<sup>262</sup> but the majority of statutes are silent on this issue and a court must ascertain the intention of Parliament.<sup>263</sup> A

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(262) For example, the Consumer Safety Act 1978 (UK), s 6, gives purchasers a civil cause of action for breach of the duties which that Act imposes (see Plummer, 'Products Liability in Britain' (1980) 9 Anglo-American Law Review 65, 75); conversely, the Broadcasting Act 1976 (NZ), ss 24(4), 95(2), expressly state that the Broadcasting Corporation and private broadcasting corporations may not be sued in the courts for non-compliance with statutory standards.

(263) This is no easy task and the courts may well be pursuing 'the will o' the wisp of a non-existing legislative intention' in many cases. See the New Zealand 'warrant of fitness' cases; namely, *Dromorne Linen Co v Ward* [1963] NZLR 614; *Berret v Smith* [1965] NZLR 460; *Fenton v Scottys Car Sales Ltd* [1968] NZLR 460; *Automobile Centre (Auckland) Ltd v Facer* [1974] 2 NZLR 767. The two earlier decisions came to the conclusion that a traffic regulation (requiring a motor vehicle vendor to deliver a warrant of fitness issued not more than 30 days before the date of delivery of the vehicle to a purchaser) was designed for the special protection of the purchaser of a motor car; conversely in the later cases the courts denied an intention 'to fasten a measure of consumer protection on to a piece of delegated legislation concerned essentially with road safety'; per Woodhouse J in *Fenton's* case, at 932; see also *Maceachern v Pukekohe Borough* [1965] NZLR 330, 332; *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456 (HL).

number of points may be made:

- (i) Where a duty is imposed by statute but no sanction of any kind provided, it may be presumed that the legislature intended it to be enforceable by an ordinary civil action. As Lord Simonds observed in *Cutler v Wandsworth Stadium Ltd*:<sup>264</sup> 'For, if it were not so, the statute would be but a pious aspiration'.
- (ii) Conversely, the fact that a statute prescribes a special remedy for the enforcement of a duty is a strong indication that the legislature intended the special remedy to be the only remedy.<sup>265</sup> Consequently, in *Cape Central Railways v Nothling*<sup>266</sup> it was held that, there being no duty on railway companies at common law to fence their lines, the only remedy for breach of the statutory duty imposed on them to erect and keep in good repair fences along the lines, was the special remedy prescribed by the statute; namely,

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(264) [1949] AC 398, 407. See also *Pease v Eltham Borough* [1962] NZLR 437, 439.

(265) No inference can be drawn from the fact that the duty is enforceable by ordinary criminal proceedings because nearly every statute contains a provision to that effect. See McKerron, The Law of Delict (7 ed, 1971), 276, n 3.

(266) (1889) 8 SC 25 (cited in McKerron, supra, 276); see also *Attorney General v Birkenhead Borough* [1968] NZLR 383, 389.

an action at the suit of the Attorney General for a penalty of £5 per day for every day during which their lines remained insufficiently fenced.<sup>267</sup>

- (iii) Another vitally important consideration is whether the statutory duty is owed primarily to the state and public at large, or primarily to the individual or class of individuals and only incidentally to the state and general community.<sup>268</sup> For example, in *Buckley v La Reserve*<sup>269</sup> the plaintiff became ill after eating escargots at the defendant's restaurant and there was evidence suggesting that the escargots were not fit for human consumption. As the plaintiff was not in a contractual relationship with the defendant, being a guest of a third person who had paid for the meal, she could not argue that there was a breach of the implied condition as to fitness for purpose etc. Rather, she should have sought to recover damages

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(267) See also *Atkinson v Newcastle and Gateshead Waterworks Co* (1877) 2 Ex D. 441; *Groves v Wimborne* [1898] 2 QB 402.

(268) See, for example, *O'Connor v Bray Ltd* [1937] 56 CLR 464, 468 (HCA); *Darling Island Stevedoring and Lighteridge Co Ltd v Long* (1957) 97 CLR 36; *Solomons v R. Gertstein Ltd* [1954] 2 QB 243; cf. *Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832, 841; *Lonrho Ltd v Shell Petroleum Co Ltd*, supra, 462-465.

(269) [1959] Crim. L. Rev. 451; discussed by Goldring and Richardson, 'Liability of Manufacturers for Defective Goods', (1977) 51 ALJ 127, 135.

from the restaurateur in tort, alleging that he had breached his statutory duty in supplying such food. However, the court held that the statute in question was designed to protect the public as a whole rather than any particular member of it.<sup>270</sup> Nevertheless, it must not be assumed that the mere determination that a duty was imposed for the benefit of the public at large, rather than for the benefit of a particular class of the community, gives rise to an irresistible inference that no private right of action lies.<sup>271</sup> It is always a question of construction of the particular statute and the whole Act must be considered.

- (iv) Finally, a court may weigh in the balance the adequacy or otherwise of existing common law remedies.<sup>272</sup> Strictly speaking this should be irrelevant as the task of the court is to construe the intention of the legislature as expressed in the statute but, as Williams<sup>273</sup> argues, 'the courts still profess to

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(270) Similar conclusions regarding statutory duties under Food and Drug legislation have been reached in the United Kingdom and South Africa; see, for example, *Square v Model Farm Dairy Co* [1939] 2 KB 365; *Hall v Snell & Co Ltd* [1940] NPD 314.

(271) See, for example, the comments of Atkin LJ in *Phillips v Britannia Hygienic Laundry Co Ltd*, supra, at 841-842.

(272) Per Atkin LJ, loc cit; *Square v Model Farm Dairy Co*, supra, *McCall v Abelesz* [1976] QB585; see also *Fenton v Scottys Car Sales Ltd* [1968] NZLR 929, 931.

(273) Op. cit.. See footnote 261.

construe the statute in order to arrive at a conclusion whether the legislature intended to confer a private right of action'; policy considerations are given full vent in this area which accounts for the 'surprising diversity of outcome'.<sup>274</sup>

As many commentators<sup>275</sup> have pointed out, the task of construing legislative intent is fraught with difficulty and the only feasible way in which such difficulty may be avoided is for Parliament to expressly state what its intention is when it creates a statutory duty.

*Second*, the plaintiff must show that he was one of the persons for whose benefit the duty was imposed, that is, the statute must recognise the class of plaintiff. For example, in *Hartley v Mayoh and Co*<sup>276</sup> the widow of a fireman, who was electrocuted on factory premises while fighting a fire, failed in her action against the occupier for breach of certain duties owed under statutory regulations. The regulations, which had been breached, were for the benefit of 'persons employed' by the occupier

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(274) At 244.

(275) See Williams, *op. cit.*, 244; Winfield & Jolowicz on Tort, *op. cit.*, 155-156; Salmond and Heuston on the Law of Torts, *op. cit.*, 230; Fricke, *op. cit.*, 256.

(276) [1954] 1 QB 383.

and the deceased was not a member of that class.

Similarly, a duty imposed on railways to close gates at level crossings was construed as intending to benefit roadusers only and not an engine driver in a passing train.<sup>277</sup>

*Third*, the damage must be of the kind contemplated by the statute. Thus, where statutory regulations provided that sheep carried as deck cargo should be surrounded by proper pens, and owing to the absence of such pens a plaintiff's sheep were washed overboard, it was held that the plaintiff could not recover because the purpose of this requirement was to prevent the spread of contagious diseases and not to safeguard animals against the perils of the sea.<sup>278</sup> Similarly, the statute must recognise the manner of injury; for example, in *Close v Steel Company of Wales Ltd*<sup>279</sup> section 14(1) of the Factories Act 1937, which provided that 'every dangerous part of any machinery... shall be securely fenced', fell to be construed. The plaintiff was injured by some metal pieces that flew out of some machinery, and the House of Lords decided by a majority that the

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(277) *Knapp v Railway Executive* [1949] 2 All ER 508; see also *Farmer v Robinson Gold Mining Co* 1917 AD 501; *Paulsen v CPR* (1963) 37 DLR 217.

(278) *Gorris v Scott* (1874) LR 9 Ex 125.

(279) [1962] AC 367; see also *Sparrow v Fairey Aviation Co Ltd* [1964] AC 1019.



duty imposed by section 14(1) was designed to prevent injury to workmen by their coming into contact with moving parts of the machinery and not to prevent injury through fragments flying out of the machine; that is, the object of the provision was 'to keep the worker out, not to keep the machine or its product in'.<sup>280</sup> However, as Lord Reid observed in *Donaghey v Boulton & Paul Ltd*:<sup>281</sup>

"It is one thing to say that, if the damage suffered is of a kind totally different from that which it is the object of the regulation to prevent, there is no civil liability. It is quite a different thing, however, to say that civil liability is excluded because the damage, though precisely of the kind which the regulation was designed to prevent, happened in a way not contemplated by the maker of the regulation."

With respect, this is a compelling argument and it is to be hoped that where the manner whereby the damage is inflicted is not contemplated by the statute, that this will not preclude a right of action for breach of statutory duty in respect of such damage.<sup>282</sup>

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(280) *Nicholls v F. Austin (Leyton) Ltd* [1946] AC 493, 505; per Lord Simonds.

(281) [1968] AC 1, 26. The object of a statute was to prevent men working on a roof from falling to the ground, and it was held immaterial that the plaintiff was injured by falling through a hole in the roof rather than by falling through fragile roofing material.

(282) Winfield and Jolowicz on Tort, *op. cit.*, 160 cites *Grant v National Coal Board* [1958] AC 649; *Gatehouse v John Summers & Sons Ltd* [1953] 1 WLR 742; *Littler v G.L. Moore (Contractors) Ltd* [1967] 1 WLR 1241; *McInally v Frank B. Price & Co Ltd* 1971 SLT 43; *Donaghey's* case itself, as evidencing a less restrictive approach than that apparent in *Gorris's* case and *Close's* case.

*Fourth*, the plaintiff must prove that the defendant is in breach of the statutory obligation imposed upon him. It is a question of construction whether the liability is absolute, or depends upon wrongful intent or negligence on the part of the defendant,<sup>283</sup> and it must be further shown that the defendants conduct 'came within the sphere of application of the statute or regulation'.<sup>284</sup>

*Finally*, the breach of duty must have caused the damage to the plaintiff. Thus in *McWilliams v Sir William Arrol and Co Ltd*<sup>285</sup> a widow failed to recover damages for her husband's death, which she alleged was caused by his employers' failure to provide him with a safety belt; the husband, who was a steel erector, was killed as a result of falling from a steel tower which he was assisting in building in the employers' shipyard. Although the employer was under a statutory duty to provide such a safety belt, the court held that they were not liable to the widow because the evidence disclosed that the probabilities were that he would not have worn the belt even if one had been provided. Consequently, the widow could

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(283) See, for example, *John Summers & Sons Ltd v Frost* [1955] AC 740; *Galashiels Gas Co v Millar* [1949] AC 275.

(284) See *Chipchase v British Titan Products Co* [1956] 1 QB 545.

(285) [1962] 1 WLR 295. As to the damages recoverable for breach of a statutory duty see *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161, 168.

not discharge the burden of proving the causal connection between the breach and the damage. Furthermore, if it can be shown that it is solely the plaintiff's own conduct which puts the defendant in breach of the statute, the latter is not liable.<sup>286</sup>

Where a plaintiff can prove that the aforementioned elements are present a successful action for breach of statutory duty may be instituted, and it is against this background that some of the major statutes relating to advertising in New Zealand fall to be assessed.

No statute relating to advertising in New Zealand<sup>287</sup> expressly confers a right of action in respect of a breach of an advertising provision, and, apart from the Broadcasting Act 1976 which expressly denies the possibility of any civil action being brought in respect of any breach of certain standards in that Act,<sup>288</sup> the

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(286) See, for example, *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414.

(287) For a full discussion of these statutes, see Chapter IV, Statutory Control of Advertising, *infra*. Note that the Merchandise Marks Act 1954 permits a consumer to recover damages for any loss he suffers as a result of a false trade description; that is, section 20 of that Act implies a warranty that a seller's trade description of his goods are true; a trade description may be given in an advertisement; see s 12(1)(d).

(288) See sections 24(4) and 95(2); sections 24(1) and 95(1) direct that the Broadcasting Corporation and private broadcasting stations must have regard to certain standards mentioned in those subsections, and the Corporation and private stations must also comply with programme rules prepared and promulgated by the Broadcasting Rules Committee; see sections 25, 26, 91 and the discussion, *infra*.

statutes are silent on the question of whether a private right of action is allowed. Consequently, the question in most cases is one as to the intention of the legislature in creating the duty and as Woodhouse J observed in *Fenton v Scottys Car Sales Ltd*<sup>289</sup>

"(t)he central problem ... is that usually there is no explicit evidence of the Legislature's intention one way or the other; and all attempts by the Courts to formulate a rule which might enable that intention to be discovered on a basis of consistent principle have been unsuccessful."

Consider the following statutes:

(i) The Consumer Information Act 1969. This statute contains provisions proscribing advertisements that contain express or implied representations as to the nature, quality and price etc. of any goods or services that are false or misleading in a material respect.<sup>290</sup> Does a breach of these advertising provisions entitle a consumer who has acted in reliance thereon to institute an action for breach of this statutory duty? It is submitted that no such private right of action lies. Although the Act may be viewed as 'a measure of consumer protection',<sup>291</sup> the Act contemplates that prosecution in respect of any breach shall be a measure of last resort.

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(289) Supra, at 931.

(290) See sections 9(4) and 10(2).

(291) The phrase employed by Woodhouse J in *Fenton v Scottys Car Sales Ltd*, supra, 932.

Extensive consultative procedures are built into the Act and no prosecution can be commenced without the leave of the Examiner of Commercial Practices; before giving leave to prosecute, the Examiner must consult with the offender and endeavour to negotiate an agreement with him to ensure that the offence will not be repeated. It is contemplated that a prosecution will only take place if the offender refuses to negotiate, or enter into an agreement, or fails to comply with an agreement.<sup>292</sup>

Only in exceptional circumstances may there be a prosecution without negotiation, and then only with the leave of the Minister of Trade and Industry.<sup>293</sup> The Legislature, therefore, has made it abundantly plain that compliance with the provisions of the Act is to be sought through 'negotiation rather than prosecution'.<sup>294</sup> Consequently, to allow a consumer to sue an advertiser in respect of an alleged breach of statutory duty would be to negate the very essence of this legislation; while the Examiner would have to embark on the contorted road of consultation, the consumer could institute an action directly thereby bypassing the consultative procedures. Therefore it is suggested that Lord Tenterton's statement in *Doe d. Rochester v Bridges*<sup>295</sup> is apposite here; namely:

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(292) See section 19.

(293) See section 20.

(294) See Burrows, News Media Law in New Zealand (2 ed, 1980), 326.

(295) (1831) 1 B & Ad 847, 859.

"... where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

(ii) The Food Act 1981 and the Medicines Act 1981.<sup>296</sup>

These statutes prohibit any advertisement that is false, or is likely to deceive or mislead any person with regard to the nature, quality, strength, purity, composition, origin, age or effects etc of any food (or ingredient thereof), medicine or medical device.<sup>297</sup> Non compliance is an offence under the respective statutes rendering the offender liable to imprisonment for a term not exceeding 3 months or a substantial fine.<sup>298</sup> Under the now repealed<sup>299</sup> Food and Drugs Act 1969 consultation and negotiation procedures akin to those outlined in the Consumer Information Act 1969 were incorporated in the Act;<sup>300</sup> consequently an argument along the lines advanced in respect of the Consumer Information Act 1969 could be made out in the case of the Food and Drug Act 1969. However, both the Food Act 1981 and the Medicines Act 1981 have abandoned the mandatory consultative

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(296) These Acts are to come into force on a date to be appointed by the Governor-General by Order in Council; for purposes of this dissertation it is assumed that the relevant commencement dates have passed.

(297) See the Food Act 1981, s 11(1)(f); the Medicines Act 1981, s 57(1)(f).

(298) Food Act 1981, s 11(3); Medicines Act 1981, s 78.

(299) See the Medicines Act 1981, s 115.

(300) Food and Drug Act 1969, s 34.

procedures of their predecessor in this field, and offences of strict liability are created.<sup>301</sup> Is there, in addition to the penal sanction, an intention to confer a private right of action in respect of a breach of the advertising provisions? Reference to decisions of the courts in other jurisdictions in respect of cases decided under food and drug legislation would not assist the consumer. For example in *Square v Model Farm Dairy Co*<sup>302</sup> a father purchased some adulterated milk and his family suffered injuries after consuming the milk. The injured parties sought to establish civil causes of action for breach of the Food and Drugs (Adulteration) Act 1928 (UK) which provided, *inter alia*, that '(n)o person shall sell to the prejudice of the purchaser any article of food ... which is not of the nature, or not of the substance, or not of the quality of the article demanded by the purchaser'. The court held that it was not Parliament's intention to give a private right of action in respect of any breach of this statutory duty. Similarly in *Hall v Snell & Co Ltd*<sup>303</sup> it was held that a breach of duty imposed by public health and food and drugs legislation not to sell adulterated food, did not give a right of action to a person injured thereby, since

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(301) See the Food Act 1981, s 30; the Medicines Act 1981, s 80.

(302) [1939] 2 KB 365.

(303) 1940 NPD 314.

the legislation in question was not passed in the interests of individual persons but for the benefit and protection of the public at large. As mentioned earlier this approach was adopted in Australia in *Buckley v La Reserve*<sup>304</sup> and it is suggested that a similar attitude would be adopted in New Zealand in respect of the advertising provisions in the Food Act 1981 and the Medicines Act 1981 for the following reasons: (a) Reading the statutes as a whole<sup>305</sup> it is plain that these statutes are designed to achieve certain minimum quality standards in respect of preparation and sale of food, medicines and medical devices in the interests of the community at large; (b) Both statutes are designed to 'consolidate and amend'<sup>306</sup> the law relating to manufacture, sale and supply of these products and of major significance here is the abandonment of the consultative procedures embodied in the Food and Drugs Act 1969; Parliament therefore intends that any contravention may be prosecuted immediately and that the prosecution need not prove that the defendant intended to commit the offence. It may be argued that Parliament in directing its attention to the question of enforcement of food and drugs legislation has made specific

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(304) Supra.

(305) As Fair J observed in *United Insurance Co Ltd v R* [1938] NZLR 885, 913: 'It is well established that the object of an Act can best be ascertained by a consideration of the provision to be construed in conjunction with the whole of the provisions of the Act'.

(306) See the Preambles to the respective statutes.



provision for criminal prosecution and its failure to provide for a civil right of redress in respect of any breach of statutory duty carries with it an inference that such a right was not intended; (c) Adequate common law remedies exist for the protection of a consumer of an adulterated food or medicine and where such purchase has been induced by misleading advertising claims recourse may be had to the Contractual Remedies Act 1979 or the tortious actions for deceit and negligent misstatements.

(iii) The Credit Contracts Act 1981. This Act provides that

"No credit advertisement shall contain any information sound image or other matter, that is likely to deceive or mislead a reasonable person with regard to any particular that is material to the provision of credit." 307

Any person contravening this provision is liable on summary conviction to a fine not exceeding \$5000.<sup>308</sup> Does a breach of this advertising provision give a consumer who has acted on a misleading advertisement and thereby suffered damage any private right of recourse? Once again it is submitted that this question must be answered in the negative. Consider the case of *Jordan v Montgomery Ward & Co.*<sup>309</sup> The plaintiff alleged that the defendant

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(307) S 35.

(308) S 38.

(309) 442 F 2d 78 (1971).

had violated the credit advertising provisions of the 'Truth in Lending Act' and sought to recover damages in respect of this breach of statutory duty. The court held that he could not recover on this basis. It was noted that of the three chapters of the Act, two explicitly provided for private civil actions and that only the chapter on credit advertising did not. The court thought that this omission was deliberate and concluded:

"It is well established that courts may not enlarge by construction the language of a clear and unambiguous statute." 310

It is submitted that this reasoning is pertinent in the case of the Credit Contracts Act 1981. A New Zealand court is empowered to reopen an oppressive credit contract<sup>311</sup> and penalties are prescribed in respect of non-compliance with the mandatory disclosure provisions; namely, a credit contract may not be enforced by any person other than the debtor until such time as the requisite disclosure is effected,<sup>312</sup> and the liability of the debtor for all or part of the total cost of the credit may be extinguished.<sup>313</sup> This clear allocation of remedies in respect of oppressive credit contracts or

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(310) At 82.

(311) See sections 9-14.

(312) See section 24.

(313) See sections 25-28.

failure to comply with the mandatory disclosure provisions carries with it an irresistible inference that no private right of action exists in respect of a breach of the advertising provision.

(iv) The Animal Remedies Act 1967 and the Pesticides Act 1979. Both these statutes are concerned primarily with agricultural products and may conveniently be considered together. The Animal Remedies Act 1967 establishes a 'screening' procedure in respect of advertisements for animal remedies whereby copies of any advertisement must be submitted to an Animal Remedies Board for this body's approval before publication.<sup>314</sup> An advertisement must be approved in the form submitted unless some false, inaccurate, misleading, or exaggerated claim is made in respect of any preventive or remedial property of the remedy.<sup>315</sup> Even where an advertisement has been approved, the Board may require that the advertisement be re-submitted for approval on the ground that some claim appears to be false, etc. in the light of discoveries made or experience gained since the advertisement was approved.<sup>316</sup> Any person who wilfully causes an advertisement to be published in contravention of these provisions commits an offence and is liable on summary conviction to a fine of

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(314) S 41(1).

(315) S 41(2).

(316) S 41(4).

up to \$400. The Pesticides Act 1979 arrogates a surveillance function to a Pesticides Board and empowers the Board to direct any advertiser of a pesticide to omit or modify any inaccurate or misleading statement in an advertisement 'in such manner as the Board may direct'.<sup>317</sup> Failure to comply with such a direction is an offence punishable by a fine not exceeding \$500.<sup>318</sup> It is submitted (with monotonous regularity) that no action for breach of statutory duty may be founded on these advertising provisions. The Legislature has through these provisions created a special surveillance procedure and empowered the respective Boards to exclude misleading or deceptive advertising claims; a prosecution is perceived as a means to ensure compliance with the respective Board's wishes, rather than as a direct means to punish those advertisers who disseminate and propound misleading information as regards their products. As with the Consumer Information Act 1969, to permit the consumer to institute a private action in respect of an alleged breach of the advertising provisions would be to deny the advertiser the chance of recanting which the statutes expressly afford.

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(317) S 40(4).

(318) S 40(5).

In conclusion it is submitted that this position is most unsatisfactory for two main reasons:

(a) If the consumer were afforded a right of action in respect of any breach of an advertising duty that induced him to enter into a contract for the purchase of the advertised commodity or service, the efficacy of these provisions would be greatly enhanced. No prosecution has ever been brought under the Consumer Information Act 1969,<sup>319</sup> for example, and the Examiner of Commercial Practices and his delegates in the Department of Trade and Industry cannot mount an effective surveillance campaign over all advertisements for goods and services. Indeed the Examiner has expressly denied that his role 'entails the policing of the market place' and has stated that exclusive reliance is placed on consumers and organisations such as the Consumers' Institute, the National Council of Women and the Housewives League to bring abuses to the attention of the Examiner.<sup>320</sup> In the absence of a private right of redress based on a breach of statutory duty the motivation to complain is considerably reduced for all except the most dedicated consumer advocate who is aware of the obligations encompassed in the relevant statutes.

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(319) In part, of course, this must be attributable to the consultative approach resolving matters out of court.

(320) Correspondence with the Office of the Examiner of Commercial Practices, letter dated 12 July 1982.

(b) It is totally undesirable that the position regarding private rights of redress should be so unpredictable.

As Williams<sup>321</sup> contends

"In effect the judge can do what he likes, and then select one of the conflicting principles stated by his predecessors in order to justify his position."

The courts are often faced with the task of seeking the unexpressed intention of Parliament and in many cases this may be a pursuit of a non-existent intention. As Lord du Parc mentioned in *Cutler v Wandsworth Stadium Ltd*<sup>322</sup> these difficulties could be eliminated if Parliament explicitly stated its intention whenever it created a statutory duty.

#### (4) DEFAMATION

What, it may be asked, is the position where an advertisement in respect of goods, services and associated credit tends to lower a consumer 'in the estimation of right-thinking members of society generally or tends to make them shun and avoid him'?<sup>323</sup>

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(321) Op. cit., 246.

(322) [1949] AC 398, 410.

(323) Winfield & Jolowicz on Tort, op. cit., 274; see also Salmond and Heuston on the Law of Torts, op. cit., 516; Lawson, Advertising Law (1978), 69; the Defamation Act 1954; Pannam, 'Unauthorised Use of Names and Photographs in Advertisements', (1966) 40 ALJ 4. This topic is canvassed in some detail by Lawson and Pannam and it is proposed for this reason to simply outline the relevant law in this area.

This question has arisen frequently in the context of unauthorised endorsements. In the famous case of *Tolley v J.S. Fry and Sons Ltd*<sup>324</sup> the plaintiff, who was a renowned amateur golfer, was pictured on a poster with a slab of chocolate manufactured by the defendants protruding from his pocket. He was accompanied by a comic caddy dancing with another carton of Fry's chocolate in his hand who, in doggerel verse, compared the excellence of the chocolate with the excellence of the plaintiff's stroke. The plaintiff alleged an innuendo that the defendants insinuated that he had consented to the use of his portrait in the advertisement for gain, thus imperilling his status as an amateur golfer. Evidence was given that an amateur golfer might, in such circumstances, be called upon to resign from any reputable club. The House of Lords held that the advertisement was defamatory and that the plaintiff could recover. Numerous other cases exist in which defamation actions have successfully been brought in respect of the use of a person's name or likeness in

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(324) [1931] AC 333.

the endorsement of a product or service.<sup>325</sup> In all these cases the plaintiff has been successful because the use has involved an injury to his reputation and it is clear that if such an injury cannot be demonstrated then no action in defamation will lie. Pannam<sup>326</sup> observes that the ordinary individual may be hard pressed to demonstrate that his reputation has been injured through the unauthorised publication of his name or photograph in an advertisement for 'an ordinary individual is not lowered in the esteem of his fellows if it is thought that he receives a fee from an advertisement'.<sup>327</sup> For this reason, the law of

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(325) See, for example, *Pryce & Son Ltd v Pioneer Press Ltd* (1925) 42 TLR 29 (political poster carrying an innuendo that the printers had been guilty of a breach of faith or carelessness in their business); *Rutherford v Turf Publishers Ltd* 'The Times', 30 October 1925 (circular advised that professional footballer would give advice on football pool entries although Football Association rules prohibited this); *Plumb v Jeyes Sanitary Compounds Ltd* 'The Times', 15 April 1937 (use of photograph of ex-policeman in an advertisement for the cure of sore feet implying that his feet smelt and that he had received remuneration); *Griffiths v Bonsor Hosiery Co Ltd* 'The Times', 10 December 1935 (professional model's head and shoulders superimposed on another woman's legs in stocking advertisement carrying the implication that she had consented to, and received remuneration for, being photographed in an indecent manner); *Mazatti v Acme Products Ltd* (1930) 4 DLR 601 (private person described as using and praising a patent medicine for the cure of headaches, dizzy spells, insomnia and constipation); *Stockwell v Kellogg Company of Great Britain* 'The Times' 31 July 1973 (settlement approved on basis that a photograph of a single girl used in an advertisement aimed at 'pregnant mums' was defamatory).

(326) Op. cit.; see footnote 323.

(327) At 5.



defamation is of limited assistance to the consumer where his endorsement is employed without his consent.<sup>328</sup> However, as Pannam<sup>329</sup> points out:

"The photograph or information which is contained in the advertisement may have originated in a breach of contract or of confidence. If this is the case, then there will be a remedy by way of damages or injunction." 330

Similarly, where the use of another's name exposes him to the risk of litigation, then that use may be restrained on the basis of the principle espoused in *Routh v Webster*.<sup>331</sup>

Consequently, the limitations inherent in the law of defamation as a means to restrain the unauthorised use of endorsements in advertisements and other promotional material are redressed by the existence of other supplementary measures.

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(328) See however, *Mazatti v Acme Products Ltd*, supra, *Stockwell v Kellogg Company of Great Britain*, supra; Pannam, op. cit., 5.

(329) Loc. cit., 5.

(330) See, for example, *Pollard v Photographic Co* (1888) 40 Ch D 345; *Stedall v Houghton* (1901) 18 TLR 126; *Argyll v Argyll* [1967] Ch 302. Consequently a photographer may be restrained from using a photograph of his client for advertising purposes if there is an implied term in the contract under which the photographs were taken that all prints from the negative were for the sole use of the customer; furthermore, a court may restrain the publication of information or a photograph which involves the violation of a confidence.

(331) (1847) 10 Beav. 561. See also *Walter v Ashton* [1902] 2 Ch 282; *Burchell v Wilde* [1900] 1 Ch 551; Lawson, op. cit., 81-84. In *Walter's* case the court restrained the further publication of advertisements for bicycles described as 'The Times Bicycles'. At this time 'The Times' newspaper had a special instalment plan for the purchase of 'The Times Altas', etc. Byrne J held (at 295) 'that there was such a reasonable probability of 'The Times' being exposed to litigation, and possibly of being made responsible had they not taken steps to disconnect their name from the advertisements or circulars' that an injunction could properly be granted.

(5) INJURIOUS FALSEHOOD AND PASSING OFF

Injurious falsehood encompasses false and malicious statements affecting the reputation of another's business, as distinct from his personal reputation, in which case the matter falls to be determined according to the law of defamation.<sup>332</sup> Another form of misrepresentation concerning the business of another is the tort of passing-off which protects a plaintiff's trade reputation and name from being utilised by another, who by 'passing-off' his goods as being those of the plaintiff acquires the benefit of the latter's good name and reputation.<sup>333</sup> While these devices are designed primarily to protect the interests of those engaged in business there is a spin-off or indirect benefit to consumers in that misleading and deceptive business practices may be proscribed. Consequently it is proposed to outline briefly the scope of these torts.

As regards injurious falsehood the plaintiff must prove that the statements complained of were untrue and that they were made maliciously.<sup>334</sup> The Defamation Act

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(332) See Fleming, op. cit., 695; Salmond and Heuston on the Law of Torts, op. cit., 375.

(333) Fleming, op. cit., 700; Salmond and Heuston on the Law of Torts, op. cit., 378; Winfield & Jolowicz on Tort, op. cit., 506.

(334) See footnote 332 and the cases cited in those texts; for example, *Royal Baking Powder Co v Wright Crossley & Co* (1901) 18 RPC 95, 99. See also *Custom Glass Boats Ltd v Salthouse Brothers Ltd* [1976] 1 NZLR 36, 49.

1954 relieves a plaintiff of the necessity to prove special damage<sup>335</sup> for it is sufficient 'if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff.<sup>336</sup> In this context "malice" seems to mean some dishonest or improper motive.<sup>337</sup> Consequently, it would be sufficient for a plaintiff to prove that the defendant knew the statement to be false, or, at any rate, that he had no honest belief in its truth.<sup>338</sup> But an honest belief in an unfounded claim will not sustain an action for injurious falsehood,<sup>339</sup> nor will mere carelessness<sup>340</sup> (as opposed to a recklessness or conscious indifference to the truth).<sup>341</sup> An

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(335) That is, at common law the plaintiff must prove actual damage; for example the plaintiff would have to show that disparaging statements concerning his goods lowered the price obtainable for the goods or made it impossible to dispose of them. See *Malachy v Soper* (1836) 3 Bing NC 371.

(336) Defamation Act 1954, s 5(1).

(337) *London Ferro-Concrete Co v Justicz* (1958) 68 RPC 261, 265; *Loudon v Ryder* [1953] Ch 423, 428.

(338) *Joyce v Motor Surveys Ltd* [1948] Ch 423.

(339) *Loudon v Ryder*, supra; *Joyce v Motor Surveys Ltd*, supra; *Serville v Constance* [1954] 1 WLR 487.

(340) *Balden v Shorter* [1933] Ch 427.

(341) *Clarke v Meigher* (1917) 17 SR (NSW) 617.

excellent illustration is afforded by the case of *De Beers Abrasive Products Ltd v International General Electric Co of New York*.<sup>342</sup> The plaintiffs manufactured and marketed a natural diamond abrasive under the trademark 'Debdust' which was used for cutting concrete. The defendants circulated amongst the international trade market a pamphlet which purported to be a report of laboratory experiments which had been carried out for the purpose of comparing the performance and qualities of their abrasive made from synthetic diamonds with those of the competing 'Debdust' product. The pamphlet contained statements which reflected adversely on the 'Debdust' product and plaintiffs sought damages for the slander of their goods. The defendants sought an order striking out the statement of claim on the ground, *inter alia*, that it disclosed no reasonable cause of action. Counsel for the defendants urged, in particular, that the contents of the pamphlet amounted to no more than a glorified statement that their product was superior, and that 'every trader is entitled, as of right, to claim that his product is the best product of that kind in the world'.<sup>343</sup> However, Walton J held that if a trader elected to denigrate the goods of his rival, the test to be applied was whether a reasonable man would take the claim as being a serious claim or not. Where the claim is dressed up in the form

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(342) [1975] 2 All ER 599.

(343) Ibid., 604.

of scientifically provable fact, the claim could not be regarded as mere puffery. Consequently, where a trader makes disparaging and untrue remarks about a rival's goods through dishonest or improper motives, his statements are actionable. The consumer derives an indirect benefit through the curtailment of this misinformation that could induce the purchase of inferior goods or services.

It is also an actionable wrong to represent one's goods or services as those of another thereby cashing in on the latter's good name and reputation. This tort was considered recently in *Klissers Farmhouse Bakeries Ltd v Allied Foods Co Ltd*.<sup>344</sup> The plaintiff bread manufacturer sought an interlocutory injunction to restrain the defendant bread manufacturer from using a similar design and layout on polyethylene bread bags which the plaintiff had used for a considerable period of time in advertising and marketing his product. Vautier J held that before an action for passing-off could be sustained in this context:

"There must ... be what amounts to a representation by the defendant that his product is that of the plaintiff. This must be of such a nature or in such a manner as to cause the defendant's product to be confused with that marketed by the plaintiff so that the plaintiff suffers damage as a result." 345

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(344) [High Court, Auckland, 7 April 1982; A 240/82]; see also *Erven Warnink BV v Townend & Sons (Hull) Ltd* [1979] 2 All ER 927 (HL).

(345) At 12.

The learned judge also pointed to two further pre-requisites:

"That is, the disputed product or design or get-up must have become distinctive for goods or services of the plaintiff in the sense that the use by the plaintiff of the name or mark or get-up is regarded as proof by a substantial number of members of the public or trade of the product as one coming from the plaintiff and, secondly, that the defendant must in the course of the trade have used a similar get-up or mark in the way that it is likely or calculated to deceive and thus cause confusion and injury, actual or probable, to the goodwill of the plaintiff." 346

Applying these criteria to the facts, Vautier J found that the adoption by the defendant of the plaintiff's distinctive gingham styled patterns carried with it 'a reasonable likelihood of confusion amongst a substantial number of persons',<sup>347</sup> and granted the interlocutory relief sought. It is interesting to note that in determining the "confusion" issue Vautier J held that regard must be had to 'the average prudent person with proper eyesight and reasonable apprehension',<sup>348</sup> and reliance was placed, *inter alia*, on the affidavits of two housewives who deposed to the effect that they had mistaken the defendant's loaf for the plaintiff's. This demonstrates the

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(346) At 13.

(347) See *Hannaford & Burton Ltd v Polaroid Corporation* [1976] 2 NZLR 14, 18 (PC).

(348) Adopting the words of Haslam J in *Hansells (NZ) Ltd v Baillie* [1967] NZLR 774, 783.

incidental benefits which accrue to a consumer through the successful institution of a passing-off action in that this confusion is ended.

Illustrations abound of cases where the tort of passing-off has protected a plaintiff's trade reputation and name from being utilised by another person.<sup>349</sup> No intent to deceive need be proved<sup>350</sup> and the real question in every case is whether the particular name, mark or "get-up" associates the goods so closely with the plaintiff that it is misleading for anyone else to adopt or copy it. While the precise scope of this tort still falls to be determined it is clear that no protection is afforded a person who does not have a commercially saleable reputation in terms of this tort. As Pannam<sup>351</sup> observes

"John Citizen can be pressed into unwilling service for a toothpaste but not Bill Well-Known."

Before leaving this topic it must be mentioned that a trader is afforded additional protection in that:-

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(349) See, for example, *White Hudson & Co Ltd v Asian Organisation Ltd* [1964] 1 WLR 1466 (PC); *Lee Kar Choo v Lee Lian Choon* [1967] 1 AC 602 (PC); *Australian Marketing Development Pty Ltd v Australian Interstate Marketing Pty Ltd* [1972] VR 219; *Erven Warnink BV v Townend & Sons (Hull) Ltd*, supra.

(350) *Spalding & Bros v A.W. Gamage Ltd* (1915) 84 LJ Ch 449, 450.

(351) Op. cit., 8.

(i) The registration of his name or distinctive mark and certain other words<sup>352</sup> gives the trader the exclusive right to use the name, mark or words in connection with the goods in respect of which it has been registered.<sup>353</sup> That right is deemed to be infringed by any person other than the trader who uses it or one so closely resembling it as to deceive or cause confusion.<sup>354</sup>

(ii) An original design may be registered under the Designs Act 1953 with the result that copyright in that design is reserved to the registered proprietor for a period of five years, which may be extended by further periods of five years up to a maximum of fifteen years.<sup>355</sup> Any person who, without the licence of the registered proprietor, uses the design in connection with any article infringes the copyright in the design and may be liable to damages or to give an account of his profits obtained by virtue of the infringement as well as an injunction to restrain further infringement.<sup>356</sup>

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(352) See the Trade Marks Act 1953, s 14.

(353) Ibid, s 8.

(354) Idem.

(355) Designs Act 1953, ss 11, 12.

(356) See Garrow and Gray, Law of Personal Property (1968), 349.



These measures afford alternative grounds of relief to a trader who has registered his name, distinctive mark or design in terms of the relevant statutory schemes and it is only in respect of unregistered marks etc. that exclusive reliance will have to be placed on the tort of passing-off.

### 3. CONCLUSION

Although the consumer is accorded a comprehensive and diverse bundle of rights by statute and at common law it is abundantly clear that the real measure of benefit conferred lies in the ease of implementation of these rights, or otherwise; that is, given the dependence of substantive rights on procedural rights satisfactory access and the availability of relief are essential components in consumer protection. As one writer has expressed it

"... the most benevolent legal doctrines are of no use to a consumer if he cannot get into court to take advantage of them." 357

For a variety of reasons consumer access to the legal system has been found wanting. In *Justice Out of Reach*<sup>358</sup> the United Kingdom Consumer Council reported that 'consumers with sound legal claims are not having them adjudicated'. Similarly in David Caplowitz's study *The Poor Pay More*<sup>359</sup> he reveals that the majority of individuals do not think of law and lawyers as a source of assistance for consumer protection.

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(357) Trebilcock, 'Private Law Remedies for Misleading Advertising', (1972) 22 University of Toronto Law Journal 1, 11.

(358) H.M.S.O., July 1970, at page 17.

(359) First published in 1967; see Chapter 12.

Chief among the factors inhibiting access to the courts is the cost factor. Litigation will often involve costs and risks that far outweigh the amount at stake and as Mr Justice Douglas of the US Supreme Court once reported '[I]t takes no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars in order to get a thousand dollars ....'<sup>360</sup> Even allowing for a successful outcome and the rule that costs follow the event there is no guarantee that all costs will be recovered from the loser, and in this computation no allowance is made of the opportunity costs incurred through expenditure of time and effort associated with the litigation. Duggan<sup>361</sup> makes the additional cogent observation that while the costs following the event rule is something of a "palliative", the fact that the rule also requires an unsuccessful consumer litigant to pay the opponent's costs nullifies the impact of reducing the risks in litigation. Furthermore, the very smallness of many consumer claims make it financially unfeasible and impractical to pursue the claim - this, notwithstanding the fact that the aggregate of all such claims relating to a particular harm might be substantial.

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(360) (1934) 47 Harvard Law Review 565, 567.

(361) 'Consumer Redress and the Legal System', 1979 AULSA Conference Paper, 1, 2.

Other deterrents and obstacles include the complexity of procedure, the reluctance of solicitors to undertake consumer litigation<sup>362</sup> and the advantages that an institutional adversary enjoys.<sup>363</sup> With respect to this last point the 'mass processing of disputes may make the prosecution even of very small claims economically viable',<sup>364</sup> and such a litigant is obviously better able to bear the risk of losing. Finally, consumer ignorance means that they very often do not take the initiative to enforce their legal rights.

(a) Small Claims Tribunals

Some of the difficulties and problems outlined above can be met by the establishment of low cost forums for the settlement of disputes. Recognition of this has led to the establishment of a small claims tribunal infrastructure in New Zealand by the Small Claims Tribunals Act 1976, and there are now tribunals in most of the major centres.<sup>365</sup> The establishing Act is supported by statutory regulations entitled the Small Claims Tribunal Rules 1977, issued on 30 May 1977.

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(362) Justice Out of Reach, op. cit., 10; Ellinger, 'Small Claims Tribunals' (1977) 5 Australian Business Law Review 1.

(363) See Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', (1974) 9 Law and Society Review 95.

(364) Duggan, op. cit., 3.

(365) That is, Christchurch, Auckland, New Plymouth, Rotorua, Invercargill, Gisborne, Wellington, Hamilton, Lower Hutt and Dunedin.

The Tribunals are set up as special divisions of selected District Courts<sup>366</sup> and, in contrast to their Australian counterparts,<sup>367</sup> are not separate entities with registries and staff of their own. Each tribunal is presided over by a referee,<sup>368</sup> appointed from the ranks of barristers and solicitors of the High Court with at least 3 years experience and other specially suitable persons,<sup>369</sup> or by a District Court Judge exercising the jurisdiction of a Tribunal.<sup>370</sup>

The primary function of the tribunal is to endeavour to achieve a settlement between the parties to a dispute,<sup>371</sup> that is, conciliation is the primary objective with adjudication an essential but secondary aim. Where adjudication is necessary the Tribunal is directed to

"... determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities." 372

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(366) Small Claims Tribunals Act 1976, s 4(3).

(367) Cf. Small Claims Tribunals Act 1974-1975 of Victoria, ss 3, 13; Small Claims Tribunals Act 1973-1975 of Queensland, ss 11, 15; Small Claims Tribunals Act 1974-1975 of Western Australia, ss 11, 15.

(368) Small Claims Tribunals Act 1976 (NZ), s 5.

(369) Ibid, s 7.

(370) Ibid, s 2.

(371) Ibid, s 15(1).

(372) Ibid, s 15(4).

Furthermore, in s 15(5) of the Act the Tribunal is empowered to disregard certain exemption clauses. As one writer<sup>373</sup> has expressed it, 'the object of these provisions is to facilitate the determination of small claims on the basis of common sense instead of in reliance on the common law'. Moreover, the Tribunal is allowed to receive and take account of such evidence as it thinks fit, whether or not such evidence would be admissible in a court of law.<sup>374</sup> The Tribunal is also empowered to seek out, on its own initiative, further information,<sup>375</sup> may appoint an investigator to make detailed inquiries on any matter,<sup>376</sup> and may adopt such procedure as it best considers suited to the ends of justice.<sup>377</sup> Therefore it is clear that the legislature has aimed at achieving the maximum level of informality commensurate with efficiency and the more active role attributed the tribunal, although at odds with the traditional adversary system approach, may counteract any deficiencies in presentation or informational deficiencies.

The original Small Claims Tribunal Bill, introduced in 1975, gave the tribunals jurisdiction over claims of up to \$500 in amount in contract and quasi contract between a 'consumer' and a 'trader'.<sup>378</sup> The restriction of

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(373) Ellinger, op. cit., 121, 125.

(374) Small Claims Tribunals Act 1976, s 26(3).

(375) Ibid, s 26(2).

(376) Ibid, s 27.

(377) Ibid, s 30.

(378) Small Claims Tribunal Bill 1975, cl 2.

jurisdiction to claims as between consumer and trader clearly demonstrated that the legislature's intention was to create a 'consumer grievance court'.<sup>379</sup> However, a number of alterations were effected before the Bill was passed, the most notable being the abandonment of the consumer/trader requirement, and the addition of a jurisdiction to entertain actions in tort 'for damage to property resulting from negligence in the use, care or control of a motor vehicle'.<sup>380</sup>

The abandonment of the consumer/trader requirement marks a significant departure from the Australian approach. The Australian Acts, speaking in general terms, define a "consumer" as a natural person who acquires goods and services otherwise than in the course of business, and a "trader" as a person in the business of supplying goods and services or who regularly so holds himself out as so supplying.<sup>381</sup> In Queensland and Western Australia the term "trader" has a wider meaning than in Victoria and embraces the lessor of a dwelling house. Of great significance though, is the fact that in all these states actions can only be brought by consumers. Duggan<sup>382</sup> explains the rationale as follows:

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(379) Hammond, 'Small Claims Legislation in New Zealand', (1977) NZLJ 306, 307.

(380) Small Claims Tribunals Act 1976, s 9.

(381) Victoria, s 2; Queensland, s 4; Western Australia, s 4.

(382) Op. cit., 14.

"This limitation was imposed, perhaps at the risk of creating the appearance of a pro-consumer bias in the tribunals, because early experience with small claims tribunals in Canada and the United States had indicated that with open access they rapidly degenerated into debt collection agencies, up to 90 per cent of actions being brought by traders and creditors against consumers."

In recognition of this adverse development overseas the New Zealand legislature incorporated a safeguard, in that s 10 provides that the tribunal does not have jurisdiction to hear small claims for a debt or for a liquidated demand, unless the claimant either satisfies the Registrar that 'the claim, or part thereof, is in dispute' or establishes that 'the claim is in the nature of a counterclaim by a respondent against a claimant'. Consequently the Small Claims Tribunals may not be employed as debt collection forums unless the consumer disputes payment.

The institution of proceedings before a Tribunal is straightforward and inexpensive.<sup>383</sup> The claimant need only fill out a claim form giving the particulars of his claim and file it, with a fee of \$4.00, with the Registrar of the District Court. The Registrar will give the claimant any assistance requested in filling out the form, and subsequently will advise both claimant and

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(383) See 'Settling Disputes Simply - Small Claims Tribunals', Department of Justice leaflet.



and respondent of the time and place of the hearing. In the event of the parties coming to a settlement after a claim has been lodged, the claimant simply advises the Registrar in writing that he wishes to withdraw. The hearing itself is very informal and in accordance with this informality and a desire to keep costs down, barristers and solicitors and other persons regularly engaged in advocacy work before other types of tribunals may not appear in a representative capacity before Small Claims Tribunals.<sup>384</sup> The Referee may, however, allow representation by some other person in special circumstances, provided that person has personal knowledge of the case and authority to bind the claimant; for example a representative may be appointed for a minor or handicapped person.<sup>385</sup> Hearings are heard in private and the confidential nature of proceedings are thought to be less inhibiting to claimants and respondents.<sup>386</sup>

The Tribunal may make seven types of order:<sup>387</sup> the claim may be dismissed; payment of money required; work ordered to be performed; a declaration of non-liability made; specific chattels ordered to be delivered; harsh or unconscionable agreements varied or set aside; and,

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(384) Small Claims Tribunals Act 1976, ss 24(2), 24(5).

(385) Ibid, s 24(2); s 24(3)d.

(386) Ibid, s 25; see 'Justice for Four Dollars', Consumers Institute Teaching Notes 99, February 1978, at page 2.

(387) Small Claims Tribunals Act 1976, s 16.

agreements which have been induced by fraud, misrepresentation or mistake may be varied or set aside. Under s 29 the Tribunal is prevented from ordering that costs be awarded against a party unless that party's claim is frivolous or vexatious.<sup>388</sup>

The Act also makes provision for transfers, rehearings and appeals. Proceedings may be transferred from the Tribunal to the District Court on the application of either party or of the Tribunal's own motion in a proper case;<sup>389</sup> for example, the Tribunal may decide that the matter would be better resolved before the District Court. Proceedings commenced in a District Court, that has a Small Claims Tribunal as a division of it, must be transferred to the Tribunal if the defendant so requests in his notice of intention to defend, and in every other case proceedings may be transferred on the application of either party or of a District Court Judge or Registrar's own motion.<sup>390</sup>

The Act allows for rehearings where a party has not complied with an order, where the Tribunal has decided a case in the absence of one of the parties, and whenever the initial proceedings do not culminate in a settlement. An appeal to the District Court is possible only on the

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(388) Ibid, s 29.

(389) Ibid, s 22.

(390) Ibid, s 23.

grounds that the hearing or an investigator's inquiry called for by the Tribunal were carried out unfairly and prejudicially affected the outcome of the proceedings.<sup>391</sup> There is no provision for an appeal on error in law,<sup>392</sup> so subject to the Tribunal's power to rehear cases and its duty of observing the principles of natural justice, a Tribunal's orders are final.

The flexibility inherent in the Small Claims Tribunal's power to disregard certain exemption clauses<sup>393</sup> and to determine an issue according to the merits without strict regard to legal rights<sup>394</sup> is a considerable advantage. However, this approach may lead to countervailing uncertainty. Hammond<sup>395</sup> cites the example of an insurance contract exempting the insurer from liability where the loss is facilitated through the insured's negligence and the fact that the outcome of such a dispute will depend on the idiosyncracies of the particular referee. As Hammond<sup>396</sup> says

"The difficulty is that under an "open" system there is no objective controlling standard provided by the law or by the parties themselves (in the form of a contract) and necessarily personal opinion must weigh heavily as to the rights and wrongs of this sort of situation."

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(391) Ibid, ss 32, 33.

(392) Ibid, s 34.

(393) Ibid, s 15(5).

(394) Ibid, s 15(4).

(395) Op. cit., 309.

(396) Ibid, 310.

While there is no denying this potential difficulty, the necessity for cheap and informal resolution of disputes dictates that this risk of uncertainty must be run. Furthermore, in granting this discretion, the legislature has insisted that the substantial merits and justice of the case should prevail and that regard be had to the law - given the experience demanded of referees and the constraints of these dual criteria it is most unlikely that a 'palm tree' inconsistency will become the order of the day.<sup>397</sup>

In accordance with the desire to promote informality and to restrict costs no legal representation is permitted before the New Zealand tribunals. A big disadvantage associated with this is that a new generation of 'para lawyers',<sup>398</sup> may arise; that is, in the situation where a business has on its staff one person who appears in all its small claims, this representative is likely by experience to gain enough expertise to give him or her an advantage over an untrained adversary.<sup>399</sup> Under the Australian legislation the individual concerned could apply for the appointment of a legal representative to offset this disadvantage, but at the same time the door is opened to general appointment of counsel in disputes against businesses. An alternative solution to this

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(397) See also Frame, 'Small Claims Tribunals', (1982) NZLJ 250, 256.

(398) Trebilcock, op. cit., 16.

(399) Ellinger, op. cit., 126.

imbalance would be to restrict representatives of litigants in small claims to a recitation of their version of the facts but to disallow them the right to examine or cross examine witnesses, or to advance legal argument<sup>400</sup> - these latter functions would be the sole prerogative of the referee. It is undoubtedly true that if the right to legal representation is granted the question of costs raises its head and the viability of many small claims, currently lodged,<sup>401</sup> becomes debatable.

Not only are lawyers excluded in the interests of informality, but the traditional adversary system is abandoned in favour of the continental inquisitorial approach with the referee fulfilling a much more active role. Furthermore, the tribunals 'may receive and take into account any relevant evidence or information whether or not the same would normally be admissible in a Court of Law',<sup>402</sup> and 'may adopt such procedure as it thinks best suited to the ends of justice'.<sup>403</sup> While these major departures from the traditional common law approach have horrified some commentators,<sup>404</sup> Ison<sup>405</sup> points out

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(400) Trebilcock, op. cit., 16.

(401) Jason Lofts, a former Honours student in this Faculty of Law, examined 250 claims heard by the Christchurch Small Claims Tribunal in 1979; over one-third of the claims lodged by consumers (non-business claimants) were for less than \$100.

(402) Small Claims Tribunals Act 1976, s 26(3).

(403) Ibid, s 30.

(404) See, for example, Hammond, op. cit., 310; Lord Hailsham, The Door Wherein I Went (1975), 276.

(405) Op. cit., 27.

that the small claims referee must adopt a more "iconoclastic" approach than his superiors in the adversary system notwithstanding the risks associated with the abandonment of tried and tested common law procedural safeguards. Formal rules of procedure are incompatible with the objective of informality, rules relating to hearsay and opinion evidence would stifle much lay testimony, and the absence of legal representation imposes a burden on the referee to examine and solicit information.

Undoubtedly the Small Claims Tribunals fulfil a vital function in the cheap resolution of disputes and the steadily increasing number of claims and expansion in the number and location of tribunals testify to the popularity and necessity of such forums. Overseas experience that such tribunals degenerate into glorified debt collection agencies<sup>406</sup> is precluded to a large extent in New Zealand by section 10 of the Small Claims Tribunals Act 1976<sup>407</sup> and as Frame<sup>408</sup> observes

"By far the most frequent situation pits an individual against another individual and, indeed, individuals pursue organisations more frequently than organisations pursue individuals."

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(406) See Consumer Council, Justice Out of Reach (1970), Ch 8; Frame, op. cit., 256.

(407) Namely, that the claim for the debt be in dispute.

(408) Op. cit., 256.

If the trend in the future is reversed and organisations, businesses, etc. constitute an inordinately large percentage of all claimants, a possible solution would be to allow businesses access, but subject to the recognition that different categories of litigants have different capacities to function within the legal system, and therefore the rules should not be designed to treat all alike.<sup>409</sup> For example, Ison suggests that:

"No judgement should be entered against a non-business litigant until both:

- (i) he has been given a list of possible defences to the particular type of claim and (unless there is some urgency) usually given seven days to consider; and
- (ii) the judge has made a sufficient inquiry into the facts, including a personal discussion with the defendant, to satisfy himself that there is no defence." 410

The alternative solution of preventing business litigants from suing altogether raises the inevitable charge of consumer bias, and businesses are likely to have little respect for a tribunal to which they are denied access except as defendants.<sup>411</sup>

Consequently the establishment of small claims tribunals goes a long way towards resolving problems of consumer access to the legal system and will assist the consumer who in reliance upon false or misleading

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(409) Ison, 'Small Claims', (1972) 35 MLR 18, 29.

(410) Idem.

(411) Turner, 'Small Claims in England: Some Recent Developments', (1974) 48 ALJ 345, 348.

advertising claims and other inaccurate information is induced to purchase goods or services. However, small claims tribunals are by no means the complete and ultimate solution even for small claims. For example, where there are a large number of small claims all involving substantially the same question, to require each claimant to approach a tribunal over the issue is simply wasteful of everyone's resources; and small claims tribunals only have jurisdiction (at present) in respect of claims in contract and quasi contract and therefore are only of assistance in respect of contractual heads of liability discussed earlier - jurisdiction in respect of tortious claims is restricted to damage to property resulting from negligence associated with the use, care or control of motor vehicles.

(b) Representative and Class Actions

Provision for the institution of representative actions already exists in New Zealand in that Rule 79 of the Code of Civil Procedure provides:

"Where there are numerous persons having the same interest in an action, one or more of them may sue or be sued, or may be authorised by the Court or a Judge to defend in such an action on behalf of or for the benefit of all persons so interested."

Therefore, the question may be posed: What are the requirements and prospects for success if a consumer wishes to sue, on behalf of himself and all other consumers, an advertiser who through a misleading advertising campaign has prejudiced the whole class of consumers by



inducing the purchase of inferior merchandise or services? And, what remedies, if any, are available?

An important starting point is the case of *Duke of Bedford v Ellis*.<sup>412</sup> In considering the analogous English rule Lord MacNaghten laid down the following test:

"In considering whether a representative action is maintainable you have to consider what is common to the class, not what differentiates the cases of individual members ... given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." 413

The plaintiffs were stallholders at Covent Garden Market who belonged to a class of growers who sold their produce at the market. A statute fixed the rental payable by stallholders at the market, and six of these stallholders/growers sued the Duke of Bedford in a representative action on behalf of themselves and all other members of the class seeking a declaration that the Duke of Bedford, the owner of the market, had been charging more than the statutory rent and an injunction restraining the Duke from doing any act contrary to the rights so declared. A procedural objection to the effect that the case was not suitable for a representative action as the growers could not be identified (numbering many thousands all over the country) was overruled by the House of Lords. The Law

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(412) [1901] AC 1 (HL).

(413) Ibid, 7-8.

Lords held that there was an interest common to the class; namely, the interpretation of the statute fixing the rent.<sup>414</sup>

Another vitally important case is *Markt and Co Ltd v Knight Steamship Co Ltd*.<sup>415</sup> During the Russo-Japanese war 45 traders shipped goods on a vessel owned by the defendant company. A Russian cruiser sank the ship because it contained contraband, and two traders on behalf of themselves and the other traders brought a representative action claiming damages against the shipping company for the loss of their goods. They relied on the *Duke of Bedford* case and claimed that there was a common interest existing among the class of traders because there was an implied term in each contract of shipment that the ship would not carry contraband. Vaughan Williams and Fletcher Moulton LJ held that there was no interest which was common to the class as each claim stemmed from separate contracts of shipment. The action could not therefore proceed as a representative action and Fletcher Moulton LJ added that as damages were personal relief only they could not be claimed in a representative action.

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(414) See also *Taff Railway v Amalgamated Society* [1901] AC 442.

(415) [1910] 2 KB 1021.

Although it was the opinion of only one member of that court that damages could not be recovered in a representative action, this view has been endorsed and followed in England,<sup>416</sup> Australia<sup>417</sup> and New Zealand.<sup>418</sup> This decision has restricted considerably the usefulness of a representative action through the narrow test of what constitutes a common interest and through the preclusion of damages as being an appropriate form of relief in a representative action.<sup>419</sup>

However, in *Prudential Assurance Co Ltd v Newman Industries Ltd*<sup>420</sup> Vinelott J pointed out that in *Markt's* case there was nothing in the writs which indicated that the bills of lading were identical or that the goods subject to the various bills of lading were of the same class 'either in kind or in relation to the rules of war, under which the same article may be contraband or not according to its destination';<sup>421</sup> and, the form of relief asked, that is, damages, 'might have precluded the defendants from establishing in a subsequent action by a member of the class represented a defence (for instance,

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(416) See The Supreme Court Practice (1973), Part I, 198.

(417) See the Australian Law Reform Commission Discussion Paper No 11, Access to the Courts - II Class Actions, at page 8.

(418) See *Take Kerekere v Cameron* [1920] NZLR 302.

(419) Cf. *The Position in the United States of America*; see, infra, 216-218.

(420) [1979] 3 All ER 507.

(421) Ibid, 515; referring to the judgement of Vaughan Williams LJ in *Markt's* case (at 1026).

estoppel) which otherwise would have been available to him'.<sup>422</sup> Vinelott J<sup>423</sup> held that a representative action could be brought by a plaintiff, suing on behalf of himself and all other members of a class, where each member alleges a separate action in tort, provided three conditions are fulfilled. First, no order can properly be made in representative action if it will have the effect of conferring on any member of the class a right he could not have claimed in a separate action, or of barring a defence which a defendant could have raised in such a separate action

"Normally, therefore, if not invariably the only relief that will be capable of being obtained by the plaintiff in his representative capacity will be declaratory relief, though, of course, he may join with it a *personal claim for damages*." <sup>424</sup>

Second, there must be an interest shared by all members of the class; that is, in the tort context 'there must be a common ingredient in the cause of action of each member of that class'.<sup>425</sup> Third, the court must be satisfied that it is for the benefit of the class that the plaintiff be permitted to sue in a representative capacity.

What then are the prospects for success if a consumer wishes to sue an advertiser on behalf of himself and all other consumers? First, it may be difficult to point to a

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(422) Ibid, 516.

(423) Ibid, 520.

(424) Idem; the emphasis is my own; cf. *Emi Records Ltd v Riley* [1981] 2 All ER 838, 841.

(425) Idem.

sufficient common interest. They may all have acted in reliance upon a particular misleading statement made in an advertising campaign when purchasing the advertised product or service but the actual contracts for the purchase of the product or service may vary enormously from one retailer or supplier to the next. However, on the test propounded by Vinelott J it may be that there is a common ingredient in the cause of action of each consumer where every member of that class has a separate cause of action in contract or tort. Clearly, no award of damages for the class as a whole could be made<sup>426</sup> but the court could make a declaratory order upon which individual members could rely in their subsequent individual actions for damages.<sup>427</sup> However, it would take a committed or foolish consumer to undertake such a representative action due to rules as to costs; the unsuccessful litigant usually will be responsible for his successful opponents' costs and, save where prior arrangement as to cost sharing is made, the consumer cannot recover costs from any other member of the class.<sup>428</sup>

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(426) Authority is against such an award in a representative action and, in any event, such an award may have the effect of conferring a right on a member of the class that he would not have had in a separate action; that is, the defendant may be able to raise defences under the individual contracts with the respective retailers or suppliers.

(427) See the *Prudential Assurance Co* case, supra, 520.

(428) Obviously a consumer in pursuit of his action would incur costs anyway, but additional expense would be incurred in the preparation and pursuit of representative arguments.

The representative action is the weak and impoverished relative of the class action which has developed in the United States and which has been adopted in various other jurisdictions.<sup>429</sup> While the class action and the representative action essentially seek the same objective of allowing representatives of a class to sue on behalf of the whole class there are significant differences. As Duggan<sup>430</sup> notes:

"... whereas the principle of *res judicata* will preclude any class member relitigating an issue already determined in a class action, issues determined in a representative action may be relitigated by persons other than the original plaintiff. The doctrine of *stare decisis* will usually operate to protect defendants from a succession of identical suits, but will not necessarily stand in the way of a subsequent plaintiff who has fresh arguments to present or a better approach to the presentation of arguments previously canvassed."

Furthermore, a plaintiff may recover damages on behalf of himself and the class and the court may compute the damages due to the class without hearing individual claims; these damages are then distributable to each

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(429) See, for example, the Combines Investigation Act 1977 (Canada); Miller, 'Of Frankenstein Monsters and Shining Knights; Myth, Reality and Class Action Problem', (1979) 29 Harvard Law Review 664; Williams, 'Consumer Class Actions in Canada - Some Proposals for Reform', (1975) 13 Osgoode Hall Law Journal 1.

(430) AULSA Paper, at page 11; see footnote 361.

member of the class.<sup>431</sup> For example, in *State of West Virginia v Pfizer Co*<sup>432</sup> (a consolidation of some 60 actions known as the 'Anti-Biotics cases') various states and municipalities recovered \$120 million from a number of pharmaceutical companies for violations of the United States anti-trust laws relating to price-fixing. Of this amount, \$37 million was made available to meet the claims of individual consumers who had been prejudiced, and the balance was paid to the states and municipalities represented to be used on public health facilities.<sup>433</sup> A detailed consideration of class actions is beyond the scope of this dissertation but it is worth noting that (i) the device exhibits considerable potential to recompense the general body of consumers for misleading

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(431) Trebilcock, *op. cit.*, 27 comments that 'because of the smallness of individual claims (in many cases), the difficulty of notifying unidentified members of a class of their rights, and the difficulty of proving an individual's claim to damages, only a very small percentage of the members of the class may come forward and seek recovery'. This matter is resolved by applying the so-called 'cy-pres doctrine' whereby the court will direct the distribution of unclaimed damages in a way which as nearly as possible compensates the class of persons aggrieved. For example, in *Market St. Ry. Co v Railroad Commission* (1946) 171 P 2d 875 illegal overcharges in respect of railway fares was in issue; the court directed that any unclaimed balance of the total illegal overcharge had to be applied to the improvement of the railway company's facilities for the benefit of all users.

(432) 404 US 871.

(433) See also *Bebchick v Public Utilities* 318 F 2d 187; *Daar v Yellow Cab Co* 433 P 2d 732; *Chastain v British Columbia Power and Hydro Authority* (1973) 2 WWR 481.

advertising campaigns causing them to act to their detriment; and (ii) the Ministerial Working Party reviewing certain Consumer and Commercial Legislation<sup>434</sup> has alluded to this device as a potential means to facilitate redress on the basis that 'those who make false claims may do so to such a material degree that it approaches fraudulent deception'.

(c) Legal Aid

The problem of accessibility may also be countered by the provision of legal aid in respect of the pursuit of civil claims.<sup>435</sup> However, at present the financial conditions in order to qualify for legal aid<sup>436</sup> are such that services provided by legal aid are only available to the comparatively poor. This in itself is no bad thing, but this indicates its limited role as a solution to problems of accessibility. Furthermore, a civil legal aid survey of Department of Justice files showed that 93.5 percent of all applications arise from domestic proceedings in the District Court, the predominant use of the scheme being to enforce maintenance obligations of welfare beneficiaries.<sup>437</sup> Short of a massive increase in the qualification limits for civil legal aid, at enormous expense to the taxpayer, legal aid will be

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(434) Proposals for a Selling Practices Act (1980), at page 16.

(435) See the Legal Aid Act 1969; Legal Aid Regulations 1970.

(436) Legal Aid Act 1969, ss 17, 19; Legal Aid Regulations 1970, reg. 10.

(437) See 'The Press', 24 September 1981.



confined to a relatively small percentage of the community.

In conclusion, it is reiterated that while the consumer may be arrogated a substantial bundle of rights by statute and at common law, the real measure of the effective benefit is dependent upon the ease, or otherwise, with which these rights may be implemented. The establishment of small claims tribunals, the extension of the representative action device and of civil legal aid are examples of ways whereby redress may be facilitated. None of these measures, however, touch upon a really significant problem; that is, ignorance of legal rights. Thus, for example, the effectiveness of a small claims tribunal infrastructure for the resolution of disputes involving small claims depends to a large extent on publicity and comprehensive community legal education. Overseas studies indicate that ignorance of legal rights and available relief is particularly prevalent among the lower income groups, and two Victorian studies point to a predominantly middle class usage of that Australian state's Small Claims Tribunals.<sup>438</sup> Therefore a consumer education programme should be

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(438) See Duggan, op. cit., 16 (n56).

directed primarily at the lower income groups in an endeavour to increase awareness of rights available under modern consumer legislation and of the available remedies. Information is available to the consumer at present in such publications as *Consumer* magazine, the Consumers Institute booklet, *Consumer in Law: Your rights in the marketplace*, and the Department of Justice pamphlet *Settling Disputes Simply - Small Claims Tribunals*. The former two publications may suffer from the limitation of having an essentially middle class readership, but the widespread distribution of the Justice Department's pamphlet in Post Offices and other public buildings would create a greater awareness among the lower income groups of this relatively new and inexpensive means of redress.

#### IV. STATUTORY CONTROL OF ADVERTISING

The importance of advertising in the economic framework, recognition of the fact that only an adequately informed consumer is capable of making a rational and optimum choice as between competing alternatives, and the need to protect the consumer from exaggerated, and sometimes dangerous, claims, has led successive legislatures to enact numerous and diverse statutes for the control of advertising.<sup>1</sup> In general terms these statutes endeavour to ensure:-

- (i) that advertisements are not misleading or deceptive; and, to a much lesser extent,
- (ii) that the consumer is given sufficient information about competing goods and services so as to facilitate a rational choice.

In pursuit of these objectives various approaches are adopted and it is proposed in this part to identify and discuss the statutory controls as they apply in relation to particular subject matters (e.g. credit, goods, food, medicines and medical devices etc.) as opposed to giving a 'statute by statute' commentary.

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(1) For example, current statutes concerned with advertising to a greater or lesser extent include the Stock Foods Act 1946, the Merchandise Marks Act 1954, the Animal Remedies Act 1967, the Consumer Information Act 1969, the Dangerous Goods Act 1974, the Pesticides Act 1979, the Toxic Substances Act 1979, the Credit Contracts Act 1981, the Food Act 1981, the Flags, Emblems and Names Protection Act 1981, and the Medicines Act 1981. Although some of these later statutes are not yet in force, or fully in force, it is assumed for purposes of this dissertation that the relevant commencement dates have arrived.

# 1. CREDIT ADVERTISEMENTS

A very broad definition of 'credit advertisement' is given in the Credit Contracts Act 1981 in that any information, sound, image or other matter that is communicated to the public by whatever means and that notifies or implies the availability of credit, falls within the scope of this definition.<sup>2</sup>

The theory that a credit purchaser becomes hypnotised by a product or service to the extent that he is less concerned with the financial particulars than a cash purchaser carried sufficient weight with the Contracts and Commercial Law Reform Committee for them to recommend that special provision be made for misleading credit advertisements.<sup>3</sup> Such advertisements must not contain

...any information, sound, image or other matter, that is likely to deceive or mislead a reasonable person with regard to any particular that is material to the provision of credit. 4

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- (2) s 34. Dugdale, The Credit Contracts Act 1981, (1981), 64 comments that '[t]he use of the word "public" in this definition may cause the same difficulties of interpretation as has its use in the definition of "prospectus" in the Companies Acts. It is arguable that an invitation addressed to a coterie of friends or existing customers would not be caught by this definition because it was not communicated to the public'.
- (3) Credit Contracts Report, February 1977, para 10.06. The Committee comments that a credit purchaser develops a 'psychological commitment upon seeing the product or upon discovery that the product is available at some shop on terms which the purchaser can meet'.
- (4) Credit Contracts Act 1981, s 35.

The crucial phrase is 'likely to deceive or mislead' but nowhere is this phrase or the pivotal terms 'deceive' or 'mislead' defined in the Act. However, assistance can be obtained by consulting the recognised dictionaries to ascertain the plain meaning of the terms and by considering the various judicial pronouncements on the terms in other statutory contexts.

In *CRW Pty Ltd v Sneddon*<sup>5</sup> the New South Wales Industrial Commission upheld a conviction under section 32 of the Consumer Protection Act 1969 (NSW) in that an advertisement carried in the Sydney Daily Mirror for the sale of a motor car on credit terms was misleading in a material particular. The advertisement read, inter alia, 'A number of people will buy New Valiant.....and pay no interest'. The advertisement did not sufficiently disclose the nature of the proposed credit transactions envisaged, nor did the advertisement reveal that the transactions referred to in the advertisement were not generally available, but only were available in certain special circumstances to persons who passed a 'credit worthiness test'. The majority of the Commission adopted the *Oxford English Dictionary* definition of the term 'mislead' and concluded that an advertisement is misleading if it is capable of leading people into error. The words in the advertisement had to be interpreted on 'the natural meaning they would convey as a matter of ordinary English,'<sup>6</sup> and

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(5) (1972) 72 AR 17.

(6) Ibid, 19.

whilst many members of the public may be familiar with financial operations and the requirements of creditworthiness, the advertisement as a whole could have led some people to believe that finance would be available to any applicant. Thus in the view of the Commission capacity to lead people "into error" is sufficient; there is no requirement that the advertisement cause actual deception. The High Court of Australia came to a similar conclusion in *Hornsby Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd*<sup>7</sup> where section 52(1) of the Trade Practices Act 1974<sup>8</sup> fell to be construed. This section provides that a corporation shall not 'engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. Murphy J held<sup>9</sup> that

...conduct is deceptive or misleading if it has a capacity or tendency to mislead or deceive.

This approach corresponds to that adopted in the United States. The Federal Trade Commission Act of 1914<sup>10</sup> provides, inter alia, that 'unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce' are unlawful.<sup>11</sup> In *PEP Boys - Manny, Moe and Jack Inc. v FTC*<sup>12</sup>

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(7) (1978) 18 ALR 639.

(8) As amended by the Trade Practices Amendment Act 1977.

(9) at 651.

(10) As amended by the Wheeler-Lea Trade Commission Act of 1938.

(11) s 5.

(12) 122 F 2d 158 (1949).

it was held that a breach of this provision had occurred where a company took an extensively advertised and well-known brand name, that is, Remington, and adopted it as a brand name for its radio receiving sets, as the natural and probable result was that purchasers may have been deceived into purchasing a radio which in normal circumstances they may not have elected to buy. Proof of actual deception was not required as it was sufficient that the conduct could have deceived purchasers into believing that the radios were in some way associated with the well-known Remington brand.

Similarly, it is submitted, there is no requirement of actual deception under section 35 of the Credit Contracts Act 1981 and that it is the potentiality of the credit advertisement to deceive or mislead that is relevant. This outcome, however, must be "likely" and as McMullin J pointed out in *Transport Ministry v Simmonds*<sup>13</sup> the meaning to be accorded to the word "likely" will vary according to the context in which it is used. But the learned judge did state that

An event which is likely may be an event which is probable but it may also be an event which, while not probable, could well happen. But it must be more than a bare possibility.<sup>14</sup>

The next question that must be asked is whether any intention to deceive or mislead is required. Under

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(13) [1973] 1 NZLR 359 (case involving breach of Civil Aviation Regulations).

(14) Ibid at 363; see also *Dunning v United Liverpool Hospitals' Board of Governors* [1973] 2 All ER 454 where the word "likely" was interpreted as meaning "may or may well".

section 52(1) of the Australian Trade Practices Act 1974 there is no requirement that the perpetrator of the conduct have an intention to deceive or mislead.<sup>15</sup> As the authors of a leading text<sup>16</sup> on consumer protection point out:

The underlying rationale of the strict liability view is that section 52 is concerned solely with the real and potential impact of commercial conduct and not with the state of mind of the person engaging in that conduct.<sup>17</sup>

It is submitted that section 38 of the Credit Contracts Act 1981 should be similarly viewed as creating an offence of strict liability in respect of misleading credit advertisements. Notwithstanding the presumption in favour of the requirement of *mens rea*,<sup>18</sup> the words employed in the statute and the subject matter with which it deals point to strict liability. The mere fact that the statute employs no such word as 'knowingly' or other word positively identifying *mens rea* obviously does not lead one to the irresistible conclusion that *mens rea* is NOT needed. However, strict liability is strongly suggested where, as here, a statute provides that if a particular

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(15) *Hornsby Building Information Centre Pty. Ltd. v Sydney Building Information Centre Pty. Ltd.*, supra, 647, 651.

(16) Goldring and Maher, Consumer Protection Law in Australia (1979).

(17) *Ibid*, 199; see also *Gimbel Bros Inc. v FTC*, 116F 2d 578, 579, where a similar rationale is advanced *vis-a-vis* the United States legislation.

(18) See, for example, *Sherras v De Rutzen* (1895) 1 QB 918; cf *Hobbs v Winchester Corp'n* [1910] 2 KB 471.



event occurs then in such a case the perpetrator is guilty of an offence.<sup>19</sup> Furthermore, where the enactment creating the offence is basically regulatory, that is, it regulates the way in which a lawful activity is practised, there will be a tendency to regard any offences created by it as being ones of strict liability.<sup>20</sup> Moreover, it is clear that the size of the penalty to which a person is liable should he be convicted, and the stigma attached to such a conviction, will be relevant considerations to which a court will have regard in deciding whether strict liability is imposed. It is suggested that the fact that no period of imprisonment may be imposed in respect of a contravention of section 35 of the Credit Contracts Act 1981 more than outweighs the fact that a fine of fairly substantial proportions may be levied in this regard. Finally, and perhaps most importantly, it is surely the effect on the consumer that is all important, rather than the intent with which the act or conduct was perpetrated.

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(19) For example: *Police v Taylor* [1965] NZLR 87 (Impounding Act 1955, s 33; where stock is found on the road the owner is liable and subject to a fine); *Helleman v Collector of Customs* [1966] NZLR 705 (Customs Act 1913, s 216; if a ship comes into New Zealand waters with a concealed place for smuggling the master and owner shall be liable to a penalty); *Marine Dept v Skegg Foods* [1974] 2 NZLR 646 (Shipping and Seaman Act 1952; if there is a failure to comply with the Act the owner or master of a ship shall each be deemed to commit an offence).

(20) For example: *Fisheries Inspectors v Wareham* [1974] 2 NZLR 639 (selling of undersized crayfish a strict liability penalty); *Marine Dept v Skeggs Foods* supra (taking a fishing boat to sea without a duly certified master a strict liability offence); *R v St. Margarets Trust* [1958] 2 All ER 289 (where the offence was one of breaching credit control regulations).

Consequently it is submitted that in the determination of whether or not a credit advertisement is 'likely to deceive or mislead' under section 35 the intention of the person whom the advertisement states or implies is the person from or through whom credit may be obtained, is irrelevant.<sup>21</sup>

Logically any inquiry into whether a particular credit advertisement is likely to deceive or mislead must have as its focal point the intended audience of that communication. A strict view as to the composition of that audience is adopted in Australia and the United States. For example, in *CRW Pty Ltd v Sneddon*<sup>22</sup> it was held that:

The bread is cast on very wide waters. The advertiser must be assumed to know that the readers will include both the shrewd and the ingenuous, the educated and uneducated, and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself, or (often) herself, omitted facts or to resolve ambiguities. An advertisement may be misleading even though it fails to deceive more wary readers. 23

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(21) For example: *R v Strawbridge* [1970] NZLR 909; *Sweet v Parsley* [1970] AC 132; cf *Police v Rowles* [1974] 2 NZLR 756. Note, however, that this strict liability is qualified in two situations in that the proviso to section 38 states that a person who had no knowledge of the credit advertisement before it was made or who took all reasonable steps to prevent the dissemination of the advertisement, shall not be convicted under this section. As Dugdale, op. cit. 66 asserts: "...the prosecution need do no more than identify the defendant as the creditor referred to in the contravening advertisement and the onus then passes to the defendant to demonstrate that one or other of the provisions in the proviso are applicable".

(22) Supra.

(23) At 28: see also *Parish v World Series Cricket Pty. Ltd.* (1977) 16 ALR 172, 179.

Similarly in *Florence Manufacturing v J.C. Dowd Co*<sup>24</sup> it was held that the advertisement must be looked at from the perspective of potential impact on 'the ignorant, the unthinking and the credulous who in making purchases do not stop to analyse but are governed by appearance and general impressions'.<sup>25</sup> However, the New Zealand legislature has taken a much more lenient view in that the question as to whether a credit advertisement is 'likely to deceive or mislead' must be assessed as against the standard of the reasonable person. This standard was applied in *Burch (New Plymouth) Ltd v Hughes*<sup>26</sup> where an advertisement for a food called 'Excello Lemon Cheese Spread' that appeared in the New Zealand Grocers' Review fell to be considered. Margarine, instead of butter as prescribed under a regulation made pursuant to the then Food and Drugs Act 1947, had been used in the preparation of this food. Was the description of the food, as a lemon cheese spread 'likely to deceive' a purchaser with respect to the properties of this food?<sup>27</sup> It was argued on behalf of the appellant company who marketed the spread that 'likely to deceive' must be assessed by reference to the "ordinary grocer", but this contention was rejected. Smith J held that the test

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(24) 178 F 73 (1910).

(25) At 75; see also, Millstein, 'The FTC and False Advertising', (1964) 64 Columbia L Rev 439; *FTC v Standard Education Society* 302 US 112 (1937).

(26) [1950] NZLR 423.

(27) See the Food and Drug Act 1947, s 9(1)(c).

...is whether the statement was "likely" to deceive an ordinary reasonable person with respect to the properties of the food. For the application of this test I think the Court must attribute to the ordinary reasonable person a knowledge of the requirements of [the regulation], and, in particular, in the present case, a knowledge that the standard for lemon cheese requires butter as an ingredient, and excludes margarine. 28

Notwithstanding that certain grocers and other informed shoppers might not be likely to be deceived, Smith J had no hesitation in concluding that the advertisement was likely to deceive an ordinary reasonable person, with full knowledge of the legal requirements, as to the properties of the food.

However it would not be enough if an advertisement had the potentiality to effect an individual whose comprehension and level of understanding and sophistication fell beneath the hypothetical level of understanding embraced by a reasonable person. If a credit advertisement is merely likely to deceive the gullible or ignorant then no offence is committed. No doubt Atiyah<sup>29</sup> would approve for that learned writer does not think that the best policy is to frame laws on the basis of the maxim, *Lex procurator fatuorum est*, but it is to be hoped that the New Zealand courts in assessing the level of comprehension of a reasonable person will assume that this hypothetical person has a limited understanding of financial matters, in that the effectiveness of section 34 as a curb on misleading advertising is dependent upon this assumption.

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(28) At 426.

(29) 'Consumer Protection - Time to Take Stock', (1979) 1 Liverpool Law Review 20, 44.

Finally, it is not every credit advertisement that is 'likely to deceive or mislead' that is caught by section 35, but only those advertisements which have that effect upon a reasonable person 'with regard to any particular that is material to the provision of credit'.<sup>30</sup> That materiality is to be assessed by reference to the reasonable person or consumer is infinitely preferable to the position that currently prevails *vis-a-vis* disclosure of material facts in the insurance context,<sup>31</sup> in that there may be a substantial divergence of opinion as to what would be considered material as between a reasonable consumer and a reasonable financier. For example in *CRW Pty Ltd. v Sneddon*<sup>32</sup> the Commission had to consider whether the advertisement was 'misleading' in 'a material particular'. Defence arguments that the type of financing involved was not relevant were rejected and the Commission accepted the view that the actual method of financing could be of vital concern to many purchasers. Therefore the Commission held<sup>33</sup> that if a person

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(30) Credit Contracts Act 1981, s 35.

(31) For example in *Avon House Ltd v Cornhill Insurance Co Ltd* [unreported, Christchurch 11 December 1980], Somers J stated (at 31) that '...a particular is material when it would affect the mind of a prudent insurer either in deciding whether to take the risk on the terms of the policy or in fixing the premium'. See the criticism of this test in Tarr, 'The Duty of Disclosure in Insurance Contracts', 1981 NZLJ 250.

(32) Supra.

(33) Supra, at 19.

...asserts that the transaction will be of one kind and it is of a totally different kind this is enough to make the advertisement not only misleading but misleading in a material particular.

Finally, it is respectfully submitted that Dugdale<sup>34</sup> is correct when he suggests that section 35 is wide enough to encompass a *suppressio veri* amounting to a *suggestio falsi*; that is, a deception consequent upon an omission that makes statements literally true, give an impression that is inaccurate.

While the Credit Contracts Act 1981 proscribes misleading advertising it does not set out to achieve full and comprehensive disclosure of information in credit advertisements. Disclosure of financial particulars such as the interest rate and other charges in such advertisements would not only promote 'shopping for credit' but would have a highly beneficial competitive effect.<sup>35</sup> However, notwithstanding these obvious advantages, any statutory requirement of disclosure of certain particulars in credit advertisements is fraught with complications. For one thing, mandatory rate disclosure in credit advertisements would place an unduly heavy burden upon financiers in that it would enjoin flexibility. Financiers must be able to vary their interest rates and other charges

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(34) *Op. cit.* 65; see *R v Lord Kylsant* [1932] 1 KB 422; *R v Birschirgian* [1936] 1 All ER 586.

(35) See for example, Goode, Consumer Credit (1978), 59.

according to the circumstances of each transaction; e.g. the estimated risk, the size of the loan required, whether it is to be secured or unsecured, the period, the category of goods for which finance is to be provided and so on. For this reason mandatory rate disclosure in all credit advertisements is inappropriate given that it would be likely to deceive or mislead prospective debtors if the advertised rate were not the rate at which transactions were actually consummated. Flexibility could be introduced by permitting financiers, whose rates vary according to the factors outlined above, to advertise a range of rates. However, the danger with this approach is that considerable scope for abuse is introduced in that the prospective debtor could be lured by the quotation of a relatively low rate at the lower end of the scale and then subjected to pressure to consummate a transaction at the upper end of the scale.

Under the moneylenders legislation<sup>36</sup> severe restrictions were imposed on a moneylender's right to advertise his business in that the content of such advertisements were strictly delineated. In addition to disclosing his registered name, the information permitted to be given in an advertisement was limited to a statement of the registered address at which he carried on business as a moneylender, his telegraphic address and telephone number, a statement that he lent money with or without security and of the highest and lowest sums he was prepared to lend,

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(36) Moneylenders Act 1908; Moneylenders Amendment Act 1933.

the classes of security he was willing to accept, and the date when his business was first established.<sup>37</sup> If in any advertisement he stated the interest terms upon which he was willing to lend he had to state the rate in terms of a rate per cent per annum.<sup>38</sup> These provisions were designed to prevent prospective debtors from being lured into burdensome loan contracts by attractive advertisements offering easy terms. However, there was nothing to stop moneylenders extolling the virtues of credit in general terms<sup>39</sup> and there is no sound justification to single out moneylenders for this special consideration. Under the Hire Purchase Act 1971<sup>40</sup> it was required that if an advertisement contained an amount that is expressed to be the deposit payable on certain goods, then that advertisement had to also state the cash price.

In relation to the content of credit advertisements the legislature has opted for a compromise between the extremes of mandatory disclosures of certain particulars such as the interest rate, other charges and the cash price of property or services, on the one hand, and the absolute prohibition against the disclosure of these particulars, on the other. Therefore, where an advertisement contains no indication of the interest rate or other charges at which credit may be provided, there is no

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(37) Moneylenders Amendment Act 1933, s 7.

(38) Ibid., s 7(5).

(39) See the Broadcasting Tribunal Decision No 11/81 regarding the Broadlands Finance Ltd advertisement.

(40) S 41.



obligation upon the financier to disclose the finance rate in that advertisement.<sup>41</sup> Where such an indication of the interest rate or other charges is incorporated in a credit advertisement, then the finance rate must be displayed with equal prominence and be described as such provided it is capable of calculation at the time of the communication of the advertisement to the public;<sup>42</sup> where the finance rate cannot be calculated at that time the advertisement must state the amounts or rates of all components of the cost of credit.<sup>43</sup> Similarly, any advertisement that gives the deposit payable in respect of a deferred payment disposition of property<sup>44</sup> or services must also stipulate the cash price of the property or services, and describe it as such.<sup>45</sup> Given that there are "varying degrees of specificity in financial advertising"<sup>46</sup> the approach adopted in the Credit Contracts Act 1981 appears to offer the best possible solution. While many loans, for example, are subject to widely fluctuating interest rates and other charges dependant upon the

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(41) Credit Contracts Act 1981, s 36 (as amended by the Credit Contracts Amendment Act 1982, s 5). The finance rate is defined in section 6 of the Act as meaning the rate that expresses the total cost of credit as a percentage per annum of the amount of credit.

(42) S 36(1)(a).

(43) s 36(1)(b).

(44) Such as a hire purchase agreement.

(45) S 37; cf Hire Purchase Act 1971 s 41.

(46) Goode, op. cit., 51.

prospective debtor's particular financial circumstances, loans by banks are normally available at a known rate to all customers - there is no question of varying the rate according to the degree of risk as, either, the customer is considered creditworthy enough to qualify for a loan at a going rate, or, he is refused the loan altogether. There is no sound reason to preclude such a lender from advertising its standard rate or rates, but at the same time it is not equitable, nor indeed practicable, to require similar disclosure by other lenders whose rates are variable.

## 2. ADVERTISING OF GOODS AND SERVICES

It is proposed to consider statutory control of advertising in this vital area under the following heads:

- 1) Statements as to description;
- 2) Statements of Price;
- 3) Testimonial Advertisements; and,
- 4) Miscellaneous Provisions<sup>47</sup>

### (1) STATEMENTS AS TO DESCRIPTION

#### (a) Goods and services generally

At the forefront in this area is the Consumer Information Act 1969 under which "goods" are defined as meaning 'any article or product of any kind or class that is intended for sale to any person for use or consumption'

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(47) See Burrows, News Media Law in New Zealand (2 ed, 1980), Ch.10.

and services are specifically incorporated under this umbrella.<sup>48</sup>

i) Section 9(4) of this Act provides that

No person shall publish or cause to be published ... any advertisement that contains an express or implied representation relating to the nature, suitability, quality, strength, composition, origin, age, or effects of any goods if he knows or ought to know that the representation is false or misleading in a material respect.

This section, unlike its counterpart in the Credit Contracts Act 1981,<sup>49</sup> is not one of strict liability and 'knowledge' must be either proved or imputed. As far as proving actual knowledge is concerned the test is subjective, but the objective test of the reasonable person is applicable to the question of imputed knowledge. Given that exaggeration is not by any means uncommon in the advertising arena the provision may be difficult to apply. As Burrows<sup>50</sup> suggests

The line to be drawn is that between the commendatory "puff" and provably false and misleading statements; and the comment that "the borderline of permissible assertion is not always discernible",<sup>51</sup> although originally made in a slightly different context, is surely opposite.

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(48) S 2. Note that for certain purposes this definition is restricted; for example, s 9(7) of the Act (as amended by the Medicines Act 1981, s 112) provides that s 9 subsections (1) to (4) do not apply to any food, medicine or medical device; and s 9(5) does not apply to any medicine or medical device.

(49) S 35; see also the Food Act 1981, s 11(1)(f) and the Medicines Act 1981, s 57(1)(f).

(50) Op. cit. 330.

(51) Citing Anson, Law of Contract (24 ed 1975), 229.

Often a claim will go beyond mere puffery and constitute real deception - the difficulty lies in determining the dividing line. It seems clear that in the United States a more stringent view is being adopted in that what would have been regarded as subjective opinion and legitimate puffery in the past is now being categorised as real deception.<sup>52</sup> For example, in *Colgate-Palmolive Co v FTC*<sup>53</sup> a television advertisement designed to demonstrate the moisturizing qualities of 'Palmolive Rapid Shave' involved the shaving of simulated sandpaper i.e. a "mock-up" of sand on plexiglass. The Federal Trade Commission alleged that the advertisement was deceptive in that, in fact, sandpaper could only be shaved after a lengthy period of soaking. Colgate-Palmolive's argument in rebuttal was to the effect that the advertisement was merely fanciful exaggeration and puffery. However, it was held that the demonstration puffery was inconsistent with the prevalent judicial and administrative policy of restricting, rather than expanding, so-called puffing. Similarly, in *Esso Petroleum Ltd v Commissioners of Customs and Excise*,<sup>54</sup> Lord Simon of Glaisdale commented that

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(52) See Aaker, 'Deceptive Advertising Issues', in Consumerism: Search for the Consumer Interest (1971) ed. by Aaker and Day.

(53) 310 F 2d 89 (1962).

(54) [1976] 1 All ER 117.

'... it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations' 55

Furthermore in *Ranger v Herbert A. Watts (Quebec) Ltd*<sup>56</sup>

Haines J observed that

'It seems to me the time has arrived for an examination of our law upon the obligation of manufacturers and vendors of products to implement their undertaking given in the news media by nationwide advertising. By such means they stimulate reliance upon the safety and quality of their products... . To allow a producer to evade the fair implication of his advertising is to permit him to reap a rich harvest of profit without obligation to the purchaser ... .'

Consequently a statement will cease to be a "puff" and become a representation when it assumes the guise of a credible statement of fact and it is to be hoped that "puffing" will be more strictly controlled than in years gone by.<sup>57</sup> Due presumably to the fact that the Consumer Information Act directs, *inter alia*, that no prosecution shall be brought unless there has first been an approach by the Examiner of Commercial Practices or his delegates, and an attempt made to negotiate a settlement<sup>58</sup> there is no case law on section 9(4) of the Act, and its ambit and mode of application remains a matter for speculation.

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(55) *Ibid.*, at 121.

(56) [1970] 10 DLR (3d) 395, 404-405.

(57) See Chapter III, *supra*.

(58) See s 19; note however that the Minister of Trade and Industry may authorise immediate prosecution; see s 20.

ii) Where any packaged goods<sup>59</sup> are required to have any "prescribed particular" shown on the label, it is an offence to publish or cause to be published any advertisement which includes a statement which contradicts or is inconsistent with the prescribed particular.<sup>60</sup> By 'prescribed particular' the Act is referring to the numerous items which can, by regulations made under the Act, be required to be shown on the labels of various kinds of goods; for example, the ingredients of particular goods, the date on which the goods were packaged, the date by which the contents should be used, and so on.<sup>61</sup> While the Act does not require that advertisements incorporate "prescribed particulars", and merely enjoins advertisements from contradicting such particulars, the Act does provide that if a visual advertisement contains a descriptive term relating to quantity, any prescribed particular relating to quantity must also be included in the advertisement and be of equal prominence with the descriptive term.<sup>62</sup>

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(59) As defined in the Consumer Information Act 1969, s 2.

(60) Ibid., s 9(1).

(61) Ibid., s 5.

(62) Ibid., s 9(3).

(b) Food

Food being such an important item on any consumer's shopping list, accounting for approximately twenty per cent of an average New Zealand family's disposable income, has been at the forefront of consumer products for which the most sophisticated forms of distribution and marketing have evolved. Not surprisingly, therefore, the marketing of food has been the subject of statutory regulation since the earliest times and the legislature recently passed the Food Act 1981 to 'consolidate and amend the law relating to the sale of food'.<sup>63</sup> 'Food' is widely defined in the Act as meaning 'anything that is used or represented for use as food or drink for human beings' and includes ingredients of any food or drink, anything that is intended to be mixed with or added to any food or drink, and, interestingly enough, chewing gum is one of the items meriting special inclusion.<sup>64</sup> The Act endeavours to regulate food advertisements in the following ways:

i) It is an offence to publish or cause to be published any advertisement relating or likely to cause any person to believe that it relates to a food that is 'false, or likely to deceive a purchaser, with regard to the nature, quality, strength, purity, composition, origin, age or effects of the food'.<sup>65</sup>

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(63) See the Preamble to the Act.

(64) S 2.

(65) S 11(1)(f).

This provision covers much the same ground as the equivalent provision in the Consumer Information Act 1969<sup>66</sup> - however, there is one vital difference in that it is unnecessary under the Food Act 1981 for the prosecution to prove that the defendant knew or ought to have known that the advertisement was false or likely to deceive any person. The Food Act stipulates that in any prosecution it shall not be necessary for the prosecution to prove that the defendant intended to commit the offence.<sup>67</sup> In imposing this strict liability for offences under the Act or the regulations, the Act nevertheless provides a good defence for a defendant if he proves first, that he did not intend to commit any offence against the Act or any regulation made under the Act and secondly, that he took all reasonable steps to ensure that there was compliance with the Act or any Regulations.<sup>68</sup> The position under the Food Act 1981 is the same as that which prevailed under the Food and Drugs Act 1969<sup>69</sup> and in *Dept of Health v City Dairy Ltd*<sup>70</sup> Bisson J accepted that while the test of 'all reasonable steps' was a 'stringent one',<sup>71</sup> a breach of a regulation did not *ipso facto* mean that a defendant had failed to

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(66) S 9(4).

(67) S 30(1).

(68) S 30(2).

(69) S 31.

(70) High Court, New Plymouth, 29 February 1980.

(71) See the unreported judgement of Cooke J in *Coca-Cola Bottlers (Wellington) Ltd v Comber* (High Court, Wellington, 22 May, 1975).



take all reasonable steps to ensure compliance. A defendant had to prove on a balance of probabilities that he had not intended to commit the breach and had taken all reasonable steps to comply with the Act or the Regulations.

The expression "likely to deceive" has been considered above,<sup>72</sup> and as Burrows<sup>73</sup> points out the expression is well known in trade-mark law and has been interpreted to cover words 'which involve a misleading allusion or a suggestion of that which is not strictly true, as well as words which contain a gross palpable falsehood'.<sup>74</sup> Similarly it is clear that a failure to disclose pertinent information about a food may render an advertisement open to the charge that it is false or likely to deceive the ordinary person.<sup>75</sup>

ii) It is also an offence to publish or cause to be published any advertisement relating or likely to cause any person to believe that it relates to a food which either (a) qualifies or is contrary to any particulars which regulations require to be marked on the food or package containing it; or (b) is prohibited by such regulations from being marked on the food or package containing the food; or (c) omits from the name or description of the food any words required to be included

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(72) Supra at 223-225.

(73) *Op. cit.* 332.

(74) *Eno v Dunn* (1890) 15 AC 252.

(75) See *Royal Baking Powder Co v FTC* 281 F 744 (1922): baking powder company passed off one of its products as another of its well-established products by omitting to reveal changes in the composition of its latter product.

in the name or description; or (d) fails to make any statement required by any such regulations to be made in an advertisement for that food; or, (e) makes a statement which is prohibited by such regulation in the advertisement of that food.<sup>76</sup> If the advertisement is shown on television or otherwise in a transitory manner on a screen, such as in a cinema, it is not sufficient that any words required to be incorporated in the advertisement are flashed on the screen. The words must be "exposed in clearly legible lettering for a length of time sufficient to enable them to be read by the ordinary viewer".<sup>77</sup>

The advertising offences described above can only be committed by a person who wishes to promote the sale of a food who publishes or causes the advertisement to be published on his own account or as the servant or agent of the person seeking to promote a sale.<sup>78</sup> Such a servant or agent is liable as if he had personally committed the offence unless he proves that the offence was committed without his knowledge and that he took all reasonable steps to prevent the commission of the offence.<sup>79</sup>

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(76) S 11(1).

(77) S 11(2).

(78) S 11(1).

(79) S 29.

c) Medicines, medical devices and methods of treatment

The Medicines Act 1981 contains detailed provisions<sup>80</sup> to regulate any medical advertisement which is defined as meaning

an advertisement relating, or likely to cause a person to believe that it relates, to any medicine or medical device or any ingredient or component thereof, or to any method of treatment. 81

'Medicine' receives an extended definition in the Act<sup>82</sup> and the inclusion of the expression 'medical device' and 'method of treatment' in the definition of a medical advertisement means that such things as bandages, surgical garments, preparations for curing baldness, bust developers, and body development courses are included.<sup>83</sup>

i) It is an offence to publish or cause to be published any medical advertisement that is false, or is likely to mislead any other person, with regard to the nature, quality, strength, purity, composition, origin, age, uses or effects of medicines or medical devices or components thereof.<sup>84</sup> This provision is almost identical to the one contained in the Food Act 1981<sup>85</sup> apart from the fact that the word "deceive" is used in the latter Act whereas "mislead" is used in the Medicines Act; and furthermore, that it is an offence under the Medicines Act 1981 to publish a false or misleading advertisement with

(80) See ss 56-62.

(81) S 56. See also *Telford v Shaw* [1944] NZLR 481.

(82) S 3.

(83) See s 3 (definition of medical device); s 56 (definition of method of treatment); Burrows, op. cit., 335.

(84) S 57(1)(f).

(85) S 11(1)(f).

regard to the "uses" of medicines, medical devices or components thereof. To obviate any difficulties in determination, section 57(3) of the Medicines Act 1981 declares that a medical advertisement is likely to mislead a person with regard to the uses or effects of medicines, medical devices or the components thereof if it is likely to mislead with regard to the purposes for which they can or cannot be used with reasonable safety, or in relation to the effects that such medicines, medical devices or components thereof produce or are intended to produce.

ii) No person may publish or cause to be published any medical advertisement relating to medicines or medical devices that either - (a) qualifies or is contrary to any particulars which regulations require to be marked on or attached to the medicine or medical device; or (b) is prohibited by such regulations from being marked on or attached to the product; or (c) omits from the name or description of the product any words required to be included in the name or description; or (d) fails to make any statement required to be made in any such advertisement; or (e) makes a statement prohibited by the regulations; or (f) suggests that the medicine or medical device cannot harm any person or that the product is not habit forming.<sup>86</sup> As with the Food Act 1981,<sup>87</sup> if the advertisement is shown on television

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(86) S 57(1).

(87) S 11(2).

or on film any words that a regulation directs should be incorporated in the advertisement must be clearly legible and appear for sufficient time for an ordinary viewer to read them.<sup>88</sup>

iii) A medical advertisement must not directly or by implication claim that the medicine, medical device or method of treatment advertised will *prevent*, *alleviate* or *cure* any of certain specified diseases or physiological conditions.<sup>89</sup> A long list of diseases and physiological conditions is given in the First Schedule of the Act and included in the list are alcoholism, baldness, arteriosclerosis, cancer, tuberculosis and sexual impotence. As Burrows<sup>90</sup> comments (in relation to the equivalent provision in the Food and Drug Act 1969, viz. s 10(1)(d)):

Some of these diseases or disorders are regarded as being incurable, some as being curable only by operation or skilled medical attention, some as being curable only by drugs which should not be self administered. In any event most of the diseases are of too serious a nature to allow sufferers themselves to experiment with patent medicines.

The inclusion of certain physiological conditions, such as baldness, on the list demonstrates the legislature's concern for the type of quack remedies that are advertised. For example, notwithstanding the Newspaper Publishers Association's recommendation that advertisements for

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(88) S 57(2).

(89) S 58(1)(a). See *McFarlane Laboratories Ltd v Dept of Health* [1978] 1 NZLR 861 for a consideration of the equivalent provision under the now repealed Food and Drugs Act 1969.

(90) Op. cit. 336.

baldness cures not be accepted,<sup>91</sup> 'Ma Evans' Baldness cure' was extensively advertised in New Zealand in 1980. As *Consumer*<sup>92</sup> point out the most frequent type of baldness - common male pattern baldness - has no known cure, is often hereditary, and the only proven way around the problem is to get a surgical transplant. In this area, the consumer, who in reliance upon such an advertisement purchases such a baldness cure, will only lose his money. The same could be said for other quack medicines said to alleviate sexual impotence or for methods of treatment or medical devices said to solve the problem of under-developed busts - but misleading advertising in this area can have serious consequences. For example, a person on the strength of an advertisement suggesting that a medicine can cure cancer might delay getting normal medical treatment until his condition is beyond orthodox treatment. Unfortunately, due to a phenomenon described by the medical profession as the 'placebo effect' people may get a psychological boost simply by having faith in the medicine itself and delay treatment until their health has deteriorated irretrievably.

iv) An advertisement must not directly or by implication claim, indicate or suggest that the medicine, medical device or method of treatment advertised will *prevent* or *cure* any of certain specified diseases or

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(91) See Self Regulation, supra.

(92) No 176, September 1980, pp244-245.

physiological conditions.<sup>93</sup> By implication it is permissible to assert that the medicine, medical device or method of treatment will *alleviate* the problem. The diseases and physiological conditions subject to this control are specified in Part II of the First Schedule to the Act and include the common cold, impaired hearing, obesity and influenza. Consequently it is permissible for an advertisement to assert that certain tablets will provide relief from the symptoms of colds or influenza, or that certain appetite suppressants will assist a person in his/her programme to reduce weight.

It should however be noted that in any prosecution where it is alleged that an advertisement claimed, indicated or suggested that the medicine, medical device or method of treatment could prevent or cure any disease or physiological condition, such a charge may be successfully rebutted if a defendant proves that the matter claimed, indicated or suggested in the advertisement is true.<sup>94</sup> This defence is also good for an advertisement suggesting that the relevant product will alleviate a disease or physiological condition specified in Part I of the First Schedule.<sup>95</sup>

v) No medical advertisement must directly or by implication claim, indicate or suggest that the medicine, medical device or method of treatment is "a panacea or infallible".<sup>96</sup> It would not be an offence to claim that

(93) S 58(1)(b).

(94) S 58(3).

(95) Idem.

(96) S 58(1)(c).

'Brand x aspirin cures headaches' but an advertisement to the effect that 'Brand x aspirin cures headaches in every case' would infringe the above provision, in that there would be a clear intimation of infallibility.

Certain advertisements are exempt from the strict controls imposed by the provisions which have been discussed above. For example, it is permissible to advertise that a medicine, medical device or method of treatment is infallible, provided the advertisement is distributed only to persons having professional expertise in the fields of medicine, nursing or pharmacy.<sup>97</sup> Persons having such expertise are sufficiently informed and knowledgeable to objectively assess the accuracy or otherwise of such claims and consequently the necessity for state intervention disappears. As with the Food Act 1981<sup>98</sup> the prosecution need not prove that the defendant intended to commit any offence against the Act or the regulations, but a defendant may escape liability by expressly negating such an intention and by proving that all reasonable steps to ensure compliance were carried out.<sup>99</sup>

Finally, it should be mentioned that in the case of medicines that are "controlled drugs" within the meaning of the Misuse of Drugs Act 1975, the requirements under the Medicines Act 1981 are additional to those imposed

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(97) See s 60.

(98) S 30(1).

(99) S 80.



under the former Act.<sup>100</sup> By the Misuse of Drugs Regulations 1977 it is an offence to publish otherwise than to practitioners and pharmacists any advertisement promoting the sale of a 'controlled drug'. Controlled drugs are those specified in the Schedule to the Misuse of Drugs Act 1975 and include the commonly known narcotics and cannabis.

d) Agricultural Products

Given that New Zealand's economic welfare is to a large extent dependant upon a healthy agricultural sector, it is not surprising to discover that the advertising of agricultural products is subject to statutory regulation.

i) The Animal Remedies Act 1967 regulates, *inter alia*, the marketing of drugs, medicines, remedies and other therapeutic substances used for treating and preventing animal diseases. An Animal Remedies Board has been constituted and amongst its functions is the approval of advertisements.<sup>101</sup> It is illegal to advertise an 'animal remedy',<sup>102</sup> unless the advertisement has been approved by the Board. Therefore any person wishing to advertise an animal remedy must submit copies of the advertisement to the Board who must approve the advertisement in the form submitted

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(100) See the Medicines Act 1981, s 109.

(101) S 41.

(102) See s 2 for the definition of this term.

... unless some false, inaccurate, misleading, or exaggerated claim, is made in respect of any preventive or remedial property of the remedy...<sup>103</sup>

If any changes are contemplated in respect of an approved advertisement the advertisement must be resubmitted to the Board for its consideration<sup>104</sup> and in any event the Board may change its mind and of its own motion require an advertisement to be re-submitted.<sup>105</sup> Animal remedies must be licensed under the Act<sup>106</sup> and an advertisement for an animal remedy must state the license number of the remedy.<sup>107</sup> A fine of up to \$400 may be imposed upon a person who "wilfully" publishes an illegal advertisement - unlike the other statutes considered above *mens rea* is required.<sup>108</sup>

The approach adopted under the Animal Remedies Act 1967 has considerable merit in that the screening procedures involved in the allocation of a licence<sup>109</sup> mean that doubtful products are barred from the market and only proven remedies may be marketed and be the subject of advertising. The Board, being cognisant of detailed

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(103) S 41(2).

(104) S 41(3).

(105) S 41(4).

(106) See ss 18-35.

(107) S 41(6).

(108) See, for example, *R v Sheppard* [1980] 3 All ER 899 (HL).

(109) See, for example, *Wadestown Farms Ltd v Economics Laboratories (NZ) Ltd* [High Court, Hamilton, 16 November 1979]; per McMullin J.

information relating to the properties and testing of the product, are in a good position to assess whether any potential advertisement in respect of a licensed remedy is accurate and truthful.

ii) The Pesticides Act 1979 regulates the sale and use of pesticides and like the Animal Remedies Act 1967 a Pesticides Board is set up with similar powers to those employed by the Animal Remedies Board.<sup>110</sup> However, while the Pesticides Act provides that no pesticide<sup>111</sup> shall be sold unless it is first registered,<sup>112</sup> there is no requirement that advertisements in respect of registered pesticides be submitted to the Board for approval prior to their publication. Rather, the Pesticides Board exercises a watchdog role and may direct that any inaccurate or misleading statement in an advertisement for a pesticide be omitted or modified according to the Board's wishes.<sup>113</sup> An advertisement for a pesticide must contain no further reference to the registration of a pesticide beyond the fact that it has been registered under the Act.<sup>114</sup> However, where a pesticide has been registered for restricted uses,<sup>115</sup> every advertisement must state that fact and must incorporate any other statement that the Board may direct.<sup>116</sup> Where a pesticide has been granted an experimental use permit<sup>117</sup> this does not entitle the permit

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(110) Pesticides Act 1979, ss 12-20.

(111) "Pesticide" is widely defined in s 2.

(112) S 21.

(113) S 30(4).

(114) S 40(1).

(115) See s 24.

(116) S 40(2).

(117) See s 25.

holder or any other person to advertise such a product; it would be clearly undesirable for an untested or prototype product to be marketed.<sup>118</sup>

Failure to comply with the advertising provisions in the Pesticides Act 1979 renders the proprietor or vendor of the pesticide liable to a fine of up to \$500 - section 40(5) creates offences of strict liability in respect of any contraventions of subsections (1) to (4) of section 40, subject to the defence of "reasonable excuse" being available to any defendant who is alleged to have contravened subsection 4, i.e., failed to omit or modify a statement in an advertisement in accordance with the Board's directions. The powers of the Pesticides Board are rather less than those enjoyed by the Animal Remedies Board in the field of advertising in that advertisements do not have to be approved prior to publication. However, the fact that the Pesticides Board may refuse registration to a pesticide, having regard to such criteria as the nature or quantity of any ingredients of the pesticide and its effects on the health and safety of human beings, livestock and environment,<sup>119</sup> means that there is control exercised at the pre-marketing stage over the entry of new products on to the market. Furthermore, detailed information must accompany any application for registration<sup>120</sup> and therefore the Board is well placed to exercise

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(118) S 40(3).

(119) See ss 27, 24.

(120) S 22.

its watchdog role and to assess advertising in respect of any pesticide which it has registered.

iii) The Stock Foods Act 1946 provides that a vendor commits an offence if he publishes or causes to be published any advertisement containing a false or misleading statement purporting to indicate the nature, quality, purity or composition of stock food if the statement would be materially prejudicial to a purchaser of the stock food.<sup>121</sup> This is a strict liability offence punishable by a fine of up to \$100.<sup>122</sup>

e) General

The Merchandise Marks Act 1954 contains provisions of general application in the field of products advertising. "Goods" are widely defined in this Act as meaning "anything which is the subject of trade, manufacture or merchandise"<sup>123</sup> and a number of provisions are directed at the marketing of such goods.

i) It is illegal to use any word, mark or sign likely to mislead any person as to the real or actual manufacturer of goods or the place where goods were made.<sup>124</sup> The branding of goods as being of "English manufacture" when in fact they were made in Australia, obviously are words 'likely to mislead' within the ambit of this provision.<sup>125</sup>

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(121) S 22.

(122) S 19.

(123) S 2.

(124) S 9(1)(g). See also s 9(1)(f) which provides that it is an offence to falsely represent that goods offered for sale were made in New Zealand.

(125) See *Barnet Glass Rubber Co Ltd v McDonald* [1922] NZLR 767.

Marks and signs have been used since the earliest times<sup>126</sup> and it is clearly in the consumer interest that no deception occur in this area in that this would lead to a distortion in competition.

ii) It is illegal to apply a false trade description to goods, whether in an advertisement or anywhere else.<sup>127</sup> Trade descriptions caught by the Act may be given expressly or by implication; for instance, by displaying raincoats accompanied by a photograph of a wearer weathering a downpour without getting wet, thus indicating that the coats are really rain, and not only showerproof.<sup>128</sup> The term "trade description" is defined in section 2(1) to encompass any description, statement or other indication<sup>129</sup> as to any one or more of a series of listed criteria. The criteria specified include the number, quantity, measure or weight of any goods, their standard of quality, the mode and place of manufacture as well as the composition of the goods. 'False trade description' is defined as meaning a trade description which by reason of anything contained therein or omitted therefrom is false or misleading in a material respect as regards the goods to which it is applied or in connection

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(126) Marks identifying wines by year, vineyard and quality were known in Egypt in the twenty-fifth century BC., as were proprietary names of alcoholic drinks, impressed on jar stoppers, such as "The Joy Bringer" and "Draught of Heaven". See M. Grant, The Ancient Mediterranean, (1969).

(127) S 9(1)(d).

(128) S 2(1).

(129) See also s 10 where it is emphasised that the provisions of the Act relating to the application of false trade descriptions extends to the application to such goods of figures, words, or marks or combination thereof, and to the application to goods of any 'false name or initial or any person, etc'.

with which it is used, and includes every alteration of a trade description whether by way of addition, effacement or otherwise which makes the description false or misleading in a material respect.<sup>130</sup> Similar legislation exists in the United Kingdom<sup>131</sup> and Australia<sup>132</sup> and illustrations abound of cases involving false trade descriptions. For example in *Sandeman v Gold*<sup>133</sup> it was held to be a false trade description to describe as "port" what was in fact Tarragona wine, and in *Kat v Diment*<sup>134</sup> the term "non-brewed vinegar" was held to be false when applied to a solution of acetic acid and caramel. In *Commissioner of Trade and Customs v R. Bell and Co Ltd*<sup>135</sup> boxes of matches stamped with the words "R. Bell & Co Ltd, New Zealand" were held to bear a false trade description in that the matches were made in London. Similarly it is an offence to apply a trade description that is false and

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(130) S 2(1).

(131) Trade Descriptions Act 1968, repealing the Merchandise Marks Acts 1887-1953.

(132) For example: Consumer Protection Act 1969 (NSW); Consumer Affairs Act 1970-1973 (Qld); Goods (Trade Descriptions) Act 1935 (South Australia); Goods (Trade Descriptions) Act 1971-1972 (Tasmania); Consumer Protection Act 1972 (Victoria); Trade Description and False Advertisements Act 1939-1973 (WA).

(133) [1924] 1 KB 107.

(134) [1951] 1 KB 34.

(135) (1901) 19 NZLR 813.

misleading as to the type of process used in producing the goods, and there is clear infringement of this provision if machine-made cigarettes are described as being hand-made.<sup>136</sup> In relation to the composition of goods, examples include misdescriptions such as 'natural mineral water', a mixture of cotton and linen described as linen and artificial silk stockings described as silk.<sup>137</sup> Similarly in *British Gas Corporation v Lubbock*<sup>138</sup> a Gas Board brochure stated, with regard to gas cookers offered for sale, that 'Ignition is by hand-held battery torch supplied with the cooker'. This was held to be a trade description relating to the composition of goods, and therefore an offence was committed when a cooker in a modified North Sea gas version was sold without a torch, despite a notice that specifications might be changed without notice.<sup>139</sup>

It is a defence for a person, accused of breaching one or more of the provisions outlined in (i) and (ii) above, to prove that he acted without an intent to defraud.<sup>140</sup>

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(136) See *Kirsherboim v Salmon & Gluckstein Ltd* (1898) 2 QB 19.

(137) See O'Keefe The Law Relating to Trade Descriptions 49.

(138) [1974] 1 All ER 188.

(139) See also, inter alia, *Eva v Southern Motors Box Hill Pty Ltd* (1977) 15 ALR 428 (false representation that Holden Sedan was of a particular standard); *Sherrat v Gerald's The American Jewellers Ltd* (1970) 114 Sol Jo 147 (a 'diver's watch' described as waterproof is not one which fills with water after being immersed in a bowl of water for a short time).

(140) See *R v Smillie* [1956] NZLR 269 (criminal breach of trust); *Re Day-Nite Carriers Ltd* [1975] 1 NZLR 172 (Companies Act 1955, s 320); *R v Miller* [1955] NZLR 1038, 1048.



iii) It is an offence under the Merchandise Marks Act 1954 'to distribute by way of advertisement' any imported goods to which there is applied -

- 1) any name or trademark signifying a New Zealand manufacturer, dealer or trader; or,
- 2) the name of any place or district in New Zealand; or
- 3) any words which would be likely to associate the goods with New Zealand -

unless the particulars outlined above are accompanied by an indication of the origin of the goods.<sup>141</sup> This provision is designed to avoid confusion and to eliminate deceptive practices, e.g. by the simple expedient of affixing or incorporating a well known local name to a foreign product the average viewer of an advertisement for the product may assume that it was locally produced. The Act also empowers the Governor-General by Order in Council to direct that certain goods bear a statement as to their origin,<sup>142</sup> and it is an offence to advertise such goods without such an indication of origin.<sup>143</sup> It is a defence for a person to prove that he took all reasonable precautions to avoid committing an offence, and had no idea that the goods were such as required an indication as to the country of origin; such a person must also cooperate with the prosecution if so required by giving

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(141) Ss 4, 7.

(142) S 3. See, for example, the Clothing Marking Order 1956; the Dry Cell Batteries Marking Order 1957; the Footwear Marking Order 1955.

(143) S 7.

all possible information with respect to the persons from whom he obtained the goods.<sup>144</sup> Alternatively the accused may escape liability by proving that he had otherwise "acted innocently".<sup>145</sup>

## (2) STATEMENTS AS TO PRICE

Price is frequently the single most important factor in economic decision making and the maintenance and encouragement of price competition is essential to the success of a free enterprise economic system.<sup>146</sup> Price information is provided to the public primarily through advertising and this information, particularly in these inflationary times, facilitates shopping for the best buy in that consumers are able to compare prices of identical or similar goods and services and effect purchases at the best possible prices. In this area "bargain advertising" has long been recognised as an effective merchandising principle and comparative price advertising - the comparison of an item's selling price with a higher, "recommended", "manufacturer's", "list". or former price - is currently the most popular retail application of that concept.<sup>147</sup> Supermarket chains and discount stores,

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(144) S 7(5)(a).

(145) S 7(5)(b); see also *Stone v Burn* [1911] 1 KB 927; *Christie v Cooper* [1900] 2 QB 522.

(146) Recognition of this is reflected in the Commerce Act 1975 (ss 27, 28) whereby collective pricing agreements and individual resale price maintenance arrangements are prohibited.

(147) See *Consumer* 185, pp 179-181. Comparison with a "suggested retail price" is the most common form of presentation in New Zealand. Other terms used are "Normal Retail Price", "Usual Price", "List Price" or "Wholesale Price".

amongst others, employ comparative price advertising continuously, thereby gaining a reputation among consumers as a source of savings whilst at the same time increasing their market share. There are undoubted benefits associated with such advertising as retail competition is stimulated and prices are kept down.<sup>148</sup> However, other retailers who stress customer service and whose prices must be correspondingly higher, criticize comparative price advertising in that inordinate emphasis is placed on price to the detriment of other important considerations. Furthermore it is asserted that much comparative price advertising is deceptive in that the advertiser's price is often compared to an advertised reference price that is wholly fictitious or inflated, or which is subjectively produced and bears no relation to existing market prices.<sup>149</sup> It may also be suggested that offers based on recommended prices are a potential source of consumer confusion, since consumers do not necessarily comprehend what recommended prices are and cannot therefore determine the exact savings advertised.

As mentioned earlier,<sup>150</sup> the success of any free enterprise economic system depends upon free and open competition among sellers on the one hand and bargaining between sellers and informed buyers on the other, whose complex interactions in the market place create natural

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(148) See Carlisle, 'Practical Problems Arising from the Price Marking (Bargain Offers) Order 1979', (1979) 129 New LJ 815.

(149) See, for example, the views of the U.K. Committee on Consumer Protection (Final Report, 1963) (Cmnd 1781), para 588.

(150) See Chapter I, Introduction, supra.

checks and balances on economic excesses and an efficient distribution of goods and services. In theory, competition should correct the misuse of price comparison data, since consumers will soon learn that a particular advertiser's published comparative prices are not a reliable measure of advertised bargains and take their business elsewhere. However, this presupposes a perfectly competitive market with informed consumers which is far from the truth of the matter, and, in fact, the lure of the bargain, together with uneducated and sometimes uncritical consumer purchasing habits, may give a competitive advantage to the unscrupulous advertiser - at least in the short term. This, coupled with the vital importance of "price" in economic decision making, has necessitated legislative intervention.

The Consumer Information Act 1969 contains several provisions regulating statements of price in advertisements for goods. As mentioned earlier<sup>151</sup> the Act defines "goods" in very broad terms and "services" fall within this umbrella. Consequently the provisions relating to price advertising regulate most advertisements in the news media or elsewhere,<sup>152</sup> leaving aside those advertisements for the sale of houses and land, or interests therein.<sup>153</sup> The Act provides as follows:

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(151) See above; Consumer Information Act 1969, s 2(1).

(152) Advertisements in the news media and those "(b)rought to the notice of the public in any other manner whatsoever" are covered; see the Consumer Information Act 1969, s 2(1).

(153) See Burrows, *op. cit.*, 327.

- i) "No person shall publish or cause to be published any advertisement that contains any express or implied representation relating to the price of any goods, if he knows or ought to know that the representation is false or misleading in a material particular." 154

This provision undoubtedly covers outright mis-statements of the price, as well as false or misleading comparative price advertisements. Consequently, the provision will catch deceptive practices whereby direct or implicit representations are made that certain prices are the usual or regular prices of particular goods or services when in fact such amounts are in excess of the prices at which such goods or services are usually and regularly sold at retail. Similarly, where the advertised reference price is wholly fictitious there will have been non-compliance with section 10(2). However, this provision overlooks a major problem in respect of recommended prices - the "phoney" recommended price. While it is clear that a retailer breaches the above provision if he indicates falsely that goods are for sale at less than, say, the manufacturer's recommended price, there is nothing to prevent a manufacturer from recommending an unduly high price. Similarly, in the United Kingdom, the Trade Descriptions Act 1968<sup>155</sup> proscribes such practices as making false comparisons with a manufacturer's or producer's recommended price, but there too there is

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(154) S 10(2).

(155) S 11(1)(a).

nothing to prevent a manufacturer or producer setting an artificially high recommended price which retailers may refer to when advertising their selling prices.<sup>156</sup> The Price Marking (Bargain Offers) Order was introduced in 1979 in an endeavour, *inter alia*, to augment this provision in the Trade Descriptions Act, but so far as recommended prices are concerned, the order has had little or no effect. Originally it was proposed that all comparisons with a recommended price by a person who supplies goods at retail or who supplies services be prohibited; however, before the principal order took effect, an amendment was effected with the result that so long as a price has been recommended by a person acting in the course of a business, that price may be used as a basis for comparison.<sup>157</sup>

However, as regards section 10(2), it is suggested that the provision is wide enough to deal with another deceptive practice involving pricing behaviour; that is, where representations, not directly concerned with the "existence" or "amounts" of price reductions, deal with ancillary questions such as where, when and how to obtain the benefit of the reduction, or the reason for the reduction, and these representations are false or misleading as to some material matter.

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(156) See Carlisle, *supra*, note 148; Oughton, 'Restricting the control of price indications', [1982] LMCLQ 117.

(157) *Idem*.

(ii) It is an offence expressly or implicitly to represent in an advertisement that goods are available for sale below 'the normal, usual or price rate' unless the advertiser has, at the time when the goods would first be available for sale, a reasonable quantity for sale at the reduced rate.<sup>158</sup> The provision is directed at the practice of 'bait advertising', a long standing device whereby goods are advertised at attractive bargain prices being goods which the advertiser does not in fact intend to sell in more than minimal quantities, if at all. As Mussehl<sup>159</sup> explains:

" Basically a seller seeks to attract customers by advertising a product, which he does not intend to sell, at an extremely low price. When a customer responds to the ad, the seller discourages him from purchasing the "bait" and instead tries to "switch" him to a higher priced, more profitable item.... Since customers are psychologically prepared to spend their money once they're inside a store, it is merely another step for the salesman to convince them to purchase a "better" product than the one advertised, but at a higher price."

This problem of bait advertising is particularly acute as regards supermarket advertising of "specials". Once consumers enter a supermarket because its advertisements suggest that it has the best "specials" for the week, they will usually complete their shopping even if some of the specials are not available, because of the inconvenience of going elsewhere. Studies conducted in the

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(158) Consumer Information Act 1969, s 10(3).

(159) 'The Neighbourhood Consumer Centre' (1972) 47 Notre Dame Lawyer, 1093, 1099.

United States<sup>160</sup> reveal high unavailability percentages for advertised items with supermarkets generally claiming that this unavailability is the result of 'sporadic and unpredictable factors beyond their control'.<sup>161</sup> Similarly the unavailability of "specials" is by no means uncommon in New Zealand<sup>162</sup> and the attitude taken by the different supermarkets varies enormously ranging from providing a "raincheck"<sup>163</sup> through to no policy at all.

Section 10(3) of the Consumer Information Act 1969 endeavours to curtail the worst abuses associated with bait advertising by stipulating that a 'reasonable quantity' of goods must be available at the advertised reduced price. If the seller has less than a reasonable quantity he can only escape liability by specifying how many items he has available for sale at that reduced price.<sup>164</sup> Comparable legislation exists in Australia in

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(160) See, for example, Verkuil, 'Developments in the Regulation of Supermarket Advertising Practices: An Empirical Analysis' (1973) 48 New York University LR 395; Boies and Verkuil, 'Regulation of Supermarket Advertising Practices' (1972) 60 Georgetown LJ 1195.

(161) Verkuil, supra, at 405.

(162) See *Consumer* 185, at page 180.

(163) As *Consumer* 185 explains (at page 181) 'The term 'rain check' derives from American football. There is a chit issued to ticket holders entitling them to free admission on a later date if the game they have paid to see is postponed due to the weather. It is now applied to a voucher, issued by a supermarket, which entitles a customer to purchase 'specialled' goods at a later date at the advertised price'. Unfortunately not all supermarkets adopt this laudatory practice.

(164) S 10(3).



that section 56 of the Trade Practices Act 1974<sup>165</sup> enjoins a corporation from advertising the supply of goods or services at a special price, unless the corporation intends to offer to supply at that price for a reasonable period and has reasonable quantities available; what is reasonable will depend upon the nature of the market in which the corporation carries on business and the nature of the advertisement. This provision was subjected to judicial scrutiny in the recent case of *Reardon v Morley Ford Pty Ltd.*<sup>166</sup> The defendant who was a dealer in Ford motor cars advertised, in conjunction with other dealers, the availability for sale of a particular Ford motor car at '\$6,600 plus on-road costs and delivery fees'. A prospective purchaser on calling at the defendant's showrooms was advised that there was only one vehicle available at the relevant price, but that it had already been sold subject to the confirmation of finance. In holding that the provisions of section 56 of the Trade Practices Act 1974 had been breached, Smithers J held that:

"So far as quantities were concerned there can be no doubt that the required quantity would have extended to multiple vehicles of the specified kind. And, in this case, if the will to supply had been present, the defendant could have met a demand for at least 30 or 40 vehicles."<sup>167</sup>

Smithers J emphasised that while there is no objection to a seller endeavouring to dissuade a prospective customer

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(165) As amended by the Trade Practices Amendment Act 1977, s 29.

(166) (1981) 33 ALR 417 (FCA).

(167) Ibid, at 422.

from entering into the advertised deal by demonstrating, for example, the advantages of an alternative purchase, the seller must have reasonable quantities of the advertised goods available for sale.<sup>168</sup>

Similarly, while the New Zealand legislation, as encapsulated in section 10(3), does not seek to overcome the problem of unavailability, it endeavours to ensure that reasonable stocks of the advertised goods are available, and, if not, that consumers are not misled in that they are forewarned that limited stocks are available. Furthermore, where the reduced price per unit of the goods is more than \$30 the advertisement must state the number of units available at that reduced price, no matter how many items are available.<sup>169</sup>

(iii) It is also an offence to publish or cause to be published any advertisement that contains an express or implied representation suggesting that a price advantage will be gained by a purchaser by virtue of the size of a package or the quantity of goods in a package, unless there is in fact a price advantage.<sup>170</sup> Therefore where expressions such as 'Economy Size' or 'buy the larger Family Size and Save' are used, there must be some genuine saving to the purchaser in buying that size, as opposed

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(168) Idem.

(169) S 10(4). A perusal of mailbox advertising brochures and pamphlets reveals that this provision is conspicuously ignored.

(170) S 10(5).

to some other size. As Burrows<sup>171</sup> indicates, the use of the word "package" suggests that this provision is confined to goods other than services; however, where service firms represent that a saving is attainable in respect of larger contracts there must be a genuine saving to the consumer otherwise there could be a breach of section 10(2), assuming of course that the service firm knew or ought to have known that such a representation was false or misleading.

(iv) Finally, the Act<sup>172</sup> stipulates that sales at 'cost price' must be sales at a price which is the same as, or less than, the amount which the seller paid to purchase the goods and have them delivered to his premises.

The Consumer Information Act 1969 contains, therefore, very powerful and far reaching provisions for the control of statements of price in advertisements and infringements of these provisions are offences punishable by fines of up to \$500.<sup>173</sup> However, no prosecution may be commenced without the leave of the Examiner of Commercial Practices<sup>174</sup> or his delegates.<sup>175</sup> The Examiner or his delegates are under a statutory obligation to negotiate with the alleged offender in an endeavour to secure compliance<sup>176</sup> and it is only in exceptional cases that a prosecution is

(171) Op. cit. 328.

(172) Consumer Information Act 1969, s 10(6).

(173) S 18.

(174) S 19.

(175) S 16.

(176) S 19.

permitted in the absence of prior consultation and negotiation.<sup>177</sup> The fact that there has been no prosecution under the Act in the 13 years that it has been in existence does cast doubt on the efficacy of its provisions and the validity of the consultation provisions. Given that advertisements relating to price are likely to be changed at regular intervals, by the time an agreement has been negotiated with an offender that person is ready to withdraw the advertisement, or amend it, in any event.

The Commerce Act 1975 also contains provisions relating to price advertising. It is an offence to make a false or misleading statement as to whether any price has or has not been fixed or approved under the Act; or to make a false or misleading statement or any material omission in a statement purporting to state the effect of a price order or special approval; or to refer to any maximum price fixed or approved under the Act in such terms as to suggest that it is not the maximum price.<sup>178</sup> The Commerce Act 1975 makes provision for a 'Positive List' to be drawn up by the Minister of Trade and Industry of all goods that are subject to price control<sup>179</sup> and the Secretary of Trade and Industry is accorded a wide discretion to fix maximum and minimum prices for any goods

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(177) S 20.

(178) S 113.

(179) S 82.

and services enumerated in the 'Positive List'.<sup>180</sup>

Any person who offers to sell goods or services at a price that is not in conformity with a price order commits an offence.<sup>181</sup>

### (3) TESTIMONIAL ADVERTISEMENTS

Advertisers frequently make use of the personal attributes or the commercial reputation of third parties in extolling their goods and services, and in Victorian times there was a prolific, and sometimes unauthorised, use of the names and faces of the famous.<sup>182</sup> Due to the potential impact of false or misleading testimonial advertising the legislature has enacted numerous provisions designed to curb its excesses.

(i) The Consumer Information Act 1969 provides that no person shall publish an advertisement which contains a representation to the effect that goods have been approved, endorsed or recommended by any person or organisation that members of the public might reasonably expect are technically qualified to give an authoritative opinion, unless the person or organisation is so qualified, and has in fact said that it approves the goods.<sup>183</sup>

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(180) Ss 89, 90.

(181) See *Hazelwood v Richardson* [1948] NZLR 1205 (mens rea essential under analogous provision in the Control of the Prices Act 1947); *Stock v Challies* [1954] NZLR 437; O'Keefe, The Commerce Act 1975 (1976), 105.

(182) See Lawson, Advertising Law (1978), 65.

(183) S 9(5).

For purposes of this provision, goods includes services but does not include any medicine or medical device.<sup>184</sup> This provision is not without its difficulties for, as Lawson suggests,<sup>185</sup> the expression 'technically qualified' has some grey areas. Who is technically qualified to extol the virtues of an after-shave lotion? Members of the public who use it; or barbers only? It is clear that this provision is not designed to catch advertisements such as the one where Colin "Pinetree" Meads endorses tanalised fence posts, nor advertisements of the type where a bearded Ray Wolff testifies to the desirability of disposable razors. However, where a particular commodity or service is endorsed by a person or organisation that the public expects to be technically qualified to speak on the commodity or service, that person or organisation must be so qualified to speak and must have consented to the endorsement.

Similarly, in Australia, section 53(c) and section 53(d) of the Trade Practices Act 1974 outlaws false representations to the effect that goods, services or corporations have sponsorship, approval, or affiliation that they do not have. Consequently it would be an offence for an advertiser to falsely represent that its mobile electric welding machines had a State Electricity Commission of Victoria certificate of suitability;<sup>186</sup>

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(184) S 9(7); as amended by the Medicines Act 1981, s 112.

(185) 'Protection of the Consumer in New Zealand - Some Recent Developments', 1973 Otago University LR 49,55.

(186) *Larmer v Power Machinery Pty Ltd* (1977) 14 ALR 243.

or for a service station to falsely represent that it was a 'Royal Automobile Association' service station when it was not.<sup>187</sup> False testimonial advertisements are also prohibited in the United Kingdom in that the Trade Descriptions Act 1968 incorporates within the meaning of the term 'trade description' any indication of approval by any person or conformity with an approved type.<sup>188</sup> Consequently the Act would catch false claims to the effect that certain encyclopaedias were 'approved' by a well known educational institution, or that an article complies with a British Standard, when this is not the case.<sup>189</sup>

Statutory intervention is essential to prevent consumers being misled by false testimonial advertisements, and common law remedies exist for the protection of persons or organisations whose endorsement is applied to goods or services without their consent. For example, in appropriate circumstances an action for defamation may be successful,<sup>190</sup> or the tort of passing off may inhibit

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(187) *Royal Automobile Association of South Australia (Inc) v Hancock* [1939] SASR 60.

(188) S 2(1)(g).

(189) See Harvey, The Law of Consumer Protection and Fair Trading (1978), 242.

(190) See, for example, *Tolley v Fry* [1931] AC 333; *Mazatti v Acme Products Ltd* (1930) 4 DLR 601; generally, see Chapter III, supra.

the use of unauthorised endorsements.<sup>191</sup> However, the efficacy of these common law remedies varies enormously<sup>192</sup> and, in any event, such remedies will not assist the many customers who may have purchased the product or entered into a service contract on the strength of such an endorsement. Consequently the publication of an advertisement that infringes section 9(5) is an offence punishable by a fine,<sup>193</sup> with the proviso that, once again, breaches of the provision are to be dealt with by negotiation rather than prosecution.

(ii) Under the Medicines Act 1981 it is an offence to claim, either directly or by implication that a medicine, medical device, a method of treatment, is recommended by a medical practitioner, dentist, nurse, pharmacist or other "health" professional or person engaged in study or research in any of those areas.<sup>194</sup> Similarly, an offence is committed where it is suggested or indicated that the medicine, medical device or method of treatment advertised has beneficially affected the health of any

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(191) See, for example, *Hornsby Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 18 ALR 639; *Henderson v Radio Corporation Pty Ltd* (1960) 60 SR (NSW) 576; *Klissers Farmhouse Bakeries Ltd v Allied Foods Company Ltd* [High Court, Auckland, 7 April 1982]; generally, see Chapter III, supra.

(192) See Chapter III, supra.

(193) S 18(2).

(194) S 58(1)(c) ii; see also, section 2 for the definition of "practitioner".



person or group of persons.<sup>195</sup> The former provision, as was its predecessor in the Food and Drug Act 1969, is designed to prevent the suggestion that an expert has recommended the product, even if that be the truth of the matter. Therefore, medical endorsements, including the use of the terms "doctors" or "chemists", abbreviated professional qualifications or testimonials such as 'endorsed by leading physicians and surgeons', are prohibited. The latter provision casts an even wider net in the sense that no testimonial advertisement may claim, indicate or suggest that the medicine, medical device or method of treatment has beneficially affected the health or any person. However, there is nothing to prevent an advertiser from claiming or indicating that 200,000 New Zealanders use a particular medicine - provided, of course, this is true. It is clear though, that the practice whereby letters are published from satisfied users (whether real or fictitious) of a medical product, is outlawed.

(iii) No advertisement in respect of an animal remedy shall, expressly or by implication, state that the remedy is approved by the Animal Remedies Board or the Department of Agriculture.<sup>196</sup> The prohibition contained in the Police Offences Act 1927 against the publication of any advertisement using the term "Ruakura" in connection

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(195) S 58(1)(c) iii.

(196) Animal Remedies Act 1967, s 41(6); as amended by the Animal Remedies Amendment Act 1969, s 10.

with specified types of agricultural products,<sup>197</sup> is not reproduced in the Summary Offences Act 1981, which repeals the former Act, but the Flags, Emblems and Names Protection Act 1981 stipulates that every person who uses the name of this world renowned agricultural research station in connection with any business or trade or occupation commits an offence, unless such use is authorised.<sup>198</sup>

(iv) Finally, there are a number of particular rules designed to prohibit the use of other endorsements.

a) Royal or Government Patronage. Lawson<sup>199</sup>

comments that

"In days gone by, Queen Victoria was frequently depicted in the press as extolling the virtues of a well known meat extract."

Today self regulatory practices on the part of the advertising industry coupled with legislative intervention have severely curtailed the use of the words such as "Royal" or "Government" in the advertising context. The Commercial Use of Royal Photographs Rules 1962 restrict the circumstances in which royal photographs may be used for advertising purposes in the media,<sup>200</sup> and it is an offence to use publicly in connection with any business, trade or occupation any word or statement suggesting

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(197) S 22A.

(198) S 20.

(199) 'Royalty, Advertising and the Law', 1972 NZLJ 371.

(200) See Lawson Ibid, 371-372; Burrows op. cit., 353-354.

Royal or government patronage.<sup>201</sup> Similarly it is an offence to publish or cause to be published any advertisement that is likely to cause any person to believe, contrary to the fact, that the advertiser supplies goods or services to a government department or is carrying out work for such a department.<sup>202</sup> Furthermore by virtue of the Trade Marks Act 1953<sup>203</sup> it is not possible to register a trademark that would suggest Royal or government patronage, thus preventing the possibility of a prominently displayed trademark in the form of coat of arms, or heraldic emblem, conveying the impression of Royal or governmental endorsement. The prohibitions outlined above obviously do not apply where Royal or governmental consent is given, as the case may be.<sup>204</sup>

(b) Consumer Council and Consumers' Institute

The Consumer Council Act 1966 renders everyone liable to a fine of two hundred dollars who publishes or causes to be published any advertisement which states that the Consumer Council or Consumer s' Institute has approved particular goods or services.<sup>205</sup> The Council's functions,

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(201) Flags, Emblems and Names Protection Act 1981, s 14.

(202) Ibid., s 15.

(203) S 21; as amended by the Flags, Emblems and Names Protection Act 1981, s 27(1).

(204) Flags, Emblems and Names Protection Act 1981, s 14(4)(a); Trade Marks Act 1953, s 21(1).

(205) S 36.

as defined in the Act,<sup>206</sup> are 'to protect and promote the interests of consumers of goods or services by whatever lawful means appear to it expedient, and by so doing to encourage the improvement and development of industry and commerce'. Most of the Council's functions are carried out by the Consumers' Institute and the Institute, as a very important part of its work, tests and reports on the quality and price of various products and services. Given that a favourable report *vis-a-vis* a particular product or service would carry considerable weight if used for advertising or promotional purposes, it was recognised that such use had to be controlled. Rather than run the risk of findings being distorted or used out of context or in a misleading fashion,<sup>207</sup> the Act imposes a 'blanket ban' upon the use of such findings or the suggested approval by the Institute or Council in advertisements or other promotions. Given that the Council and the Consumers' Institute can only properly fulfil their functions if they maintain and foster a reputation of absolute impartiality, this approach is the only feasible one to adopt.

(c) Various other organisations, names and associations may not be exploited for advertising purposes in the absence of the express permission of the body or person in question.<sup>208</sup> For example, it is an offence

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(206) See s 16; and ss 14-22.

(207) For an example of this, see *Consumer* 84, page 121 (an advertisement for a Britax Star-rider car seat falsely stated that the Consumers' Institute approved this product).

(208) See the Flags, Emblems and Names Protection Act 1981, ss 16-20.

punishable by a fine of up to \$500 to publicly use the word "D.S.I.R." in connection with any business, trade or occupation unless that use is expressly authorised.<sup>209</sup> It is similarly an offence to suggest that ones product has other kinds of patronage or endorsement, for instance, by the United Nations,<sup>210</sup> the Girl Guides' Association<sup>211</sup> or the House of Representatives.<sup>212</sup>

The power of testimonial advertisements and endorsements to influence the average consumer's purchasing decisions make regulation in this area unavoidable. Where a particular product is advertised as having the approval of the Consumers' Institute, or as having passed rigorous D.S.I.R. tests, for example, and this is not true or is misleading, substantial distortions in purchasing patterns may result; that is, a substantial number of purchasers may buy the advertised product in preference to some other product that may be intrinsically better and/or safer and competition will be harmed severely. Therefore, extensive control in this area is not only desirable, but essential.

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(209) Ibid., ss 20(3), 24.

(210) Ibid., s 16.

(211) Ibid., s 19.

(212) Ibid., s 14.

(4) MISCELLANEOUS PROVISIONS

In addition to the general constraints imposed by the statutes discussed above,<sup>213</sup> a number of specific controls regulate advertising in particular industries, areas, and occupations.

i) Certain regulations dictate that advertisements may not suggest that consumers may contract with advertisers on terms and conditions that would contravene the regulations. For example:

a) The Hire Purchase and Credit Sales Stabilisation Regulations 1957, enacted pursuant to the Economic Stabilisation Act 1948, were introduced to restrict the availability of credit as a means to control inflation.<sup>214</sup> In pursuit of this objective the Regulations require certain minimum deposits and maximum periods of credit where certain goods are disposed of on instalment terms, and the amount owing must be paid by approximately equal instalments at approximately equal intervals.<sup>215</sup> At present, minimum deposit percentages and maximum period of credit requirements are stipulated for new and secondhand motor cars and motor cycles<sup>216</sup> and it would be

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(213) See, in particular, the provisions of the Consumer Information Act 1969 covering goods and services.

(214) See *Motor Mart Ltd v Webb* [1958] NZLR 773, 778 where Turner J stated that the Regulations were 'introduced as a restriction of banking credit and are primarily Treasury Regulations concerned with the quantity of currency in circulation'. See also, *Credit Service Investments Ltd v Carroll* [1973] NZLR 246.

(215) See the Schedules to the Regulations.

(216) Regs 2(1), 6, and the Second Schedule.

an offence to suggest in an advertisement that new motor vehicles, for example, could be purchased on hire purchase terms with a deposit of less than the minimum required under the Regulations, viz., 60 per cent. No advertisement may offer, either directly or implicitly, nor create the impression that the court regards as likely, that goods are obtainable on terms and conditions that, if made the subject of the contract, would contravene the Regulations.<sup>217</sup> These Regulations being of a penal character, are interpreted very strictly.<sup>218</sup>

b) Similarly, no advertisement may convey the impression that it offers possession of a car on terms and conditions that, if made the subject of a contract, would constitute a hiring agreement in contravention of the Economic Stabilisation (Motor Car Hiring) Regulations 1971.<sup>219</sup> These regulations contain detailed rules that *inter alia*, limit the duration of hiring agreements,<sup>220</sup> prohibit the hiring of vehicles where more than five years has elapsed since the date of first registration<sup>221</sup> and proscribe a minimum advance rental.<sup>222</sup>

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(217) Reg 7.

(218) See, for example, *Hawke's Bay Credit Corp'n Ltd v Official Assignee* [1964] NZLR 154, 157; *Quality Auto Sales Ltd v Singsam* [1975] 1 NZLR 251.

(219) Reg 7.

(220) Reg 3(2).

(221) Reg 3(1).

(222) Reg 5(1).

The impact of these regulations, from the consumer's point of view, is minimal. Numerous attempts, both lawful and unlawful,<sup>223</sup> are made to avoid and evade these provisions and the outcome of some of these successful attempts may leave the consumer in a less than satisfactory position. For example, Regulation 6 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 prohibits a seller or lender from making a loan on the security of goods in excess of the maximum loan value. Obviously, if a vendor could provide cash for a purchaser to buy the goods and then secure the loan by taking a mortgage over the goods the minimum deposit requirements of the regulations could be evaded with impunity. However, it is by no means uncommon to see advertisements for the sale of motor vehicles that suggest that no deposit is payable. A person who is unable to meet the minimum deposit requirements under the Hire Purchase and Credit Sales Stabilisation Regulations 1957 is encouraged to enter into a chattel mortgage agreement in respect of other goods that he owns, or may be persuaded to take out a second mortgage on his house. As *Consumer*<sup>224</sup> point out

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(223) See for example, *Luhrs v Baird Investments Ltd* [1958] NZLR 663 (inflation of a trade-in price); *Credit Service Investments Ltd v Quartel* [1970] NZLR 933 (lease with provision for auction sale); *Credit Service Investments Ltd v Evans* [1974] 2 NZLR 683 (lease with verbal understanding that ownership would be given).

(224) *Consumer* 184, pp 143-145.



" In this way, the law can force the sort of people who most need the protection given by the Hire Purchase Act into a kind of finance contract that gives them very inferior protection."

ii) A number of statutory provisions and regulations restrict and define the manner and extent to which certain services may be advertised.<sup>225</sup>

a) Certain occupations and professions may only be pursued by persons who are duly licensed and/or registered in terms of the legislation governing that occupation or profession. For example, the Motor Vehicle Dealers Act 1975 provides that every person who carries on business as a motor vehicle dealer must be licensed<sup>226</sup> and the Psychologists Act 1981 provides that only suitably qualified persons may be registered under the Act.<sup>227</sup> Licensing and registration schemes have numerous and diverse objectives in mind<sup>228</sup> but it is a common objective of most schemes to ensure that only suitably qualified persons of good character pursue that occupation or profession.

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(225) See Burrows, op. cit. 342.

(226) S 7. See also the Wine Makers Act 1981, s 3; the Real Estate Agents Act 1976, s 16.

(227) The Veterinary Surgeons Act 1957, s 11; Medical Practitioners Act 1968, s 18; Law Practitioners Act 1955, ss 14, 16, 23.

(228) See Chimberg, Essex and Kruger, Occupational Licensing Practices and Policies (1973); Gellhorn, 'The Abuse of Occupation Licensing' (1976) 44 University of Chicago Law Review 6.

Due to the range and complexity of certain services and products the consumer is unlikely to make an informed choice when purchasing - how, for example, is a consumer to assess the quality of different medical practitioners or plumbers? The truth of the matter is that a consumer, unless he possesses expertise in that particular field, cannot make an informed choice as he lacks the necessary experience and training to make an objective evaluation or assessment. Therefore, the consumer attaches no little significance to the fact that Joe Bloggs has been registered or licensed as a medical practitioner, lawyer, plumber or real estate agent as the case may be. The assumption often made is that occupational licensing ensures that the practitioner will have passed some examinations, has some experience and is a suitable person for the conduct of that occupation. Given this potential reliance, it is important that persons not holding the relevant qualifications should be prevented from advertising themselves as being so qualified. Consequently, persons may not describe themselves as being "licensed" or "registered" unless this is true,<sup>229</sup> nor may persons describe themselves as belonging to a particular profession or institute unless they are so entitled.<sup>230</sup> The Summary Offences Act 1981 states that it is an offence

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(229) See for example, the Valuers Act 1948, s 42; the Surveyors Act 1966, s 39.

(230) See for example, the Architects Act 1963, s 53; Motor Vehicle Dealers Act 1975, s 26; Real Estate Agents Act 1976, s 69; Surveyors Act 1966, s 40.

for anyone to use in connection with his occupation any words or initials indicating, contrary to the fact, that he has a qualification of a university or other such institution, or is a member of such institution.<sup>231</sup> The burden of proof is on the defendant to show that he is entitled to use the words or initials in question.<sup>232</sup>

b) While most professions have their own "in-house" rules relating to the content of advertisements, their size, and so on, the breach of which may result in disciplinary proceedings against the offending member, there are regulations which create punishable offences in respect of such breaches. For example, the Dentists Advertising Regulations 1970 imposes constraints on the type, content, size and frequency of any advertisement by a dentist and similar limitations apply to advertisements published by any optician.<sup>233</sup>

c) Persons pursuing certain occupations or offering certain services may be required to give certain information in any advertisement. For example under the Real Estate Agents Act 1976 and the Motor Vehicle Dealers Act 1975<sup>234</sup> licensed motor vehicle dealers and real estate agents, respectively, must give the information in all advertisements issued by them that they are licensed. Similarly, the Child Care Centre

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(231) S 20(1).

(232) S 20(2).

(233) Under the Practising Opticians Regulations 1942. See Burrows, op. cit., 343.

(234) Ss 55, 53.

Regulations 1960 provide that all such centres must be registered and provision is made for various classes of registration. In any advertisement for a centre the class of registration applicable to it, or the class of registration to which it is not entitled must be given.<sup>235</sup>

d) Section 48B of the Commerce Act 1975 makes it an offence to publish a false statement about the profitability, risk, or other material aspect of any business activity that is represented to be one that is carried on at home, or involves the selling of goods other than by a wholesaler or retailer, or the sale of services by a person other than a person who is to supply the services.

(iii) Finally, outdoor and aerial advertising are subject to particular controls in that: (a) local authorities are empowered to make bylaws to regulate, control or prohibit the display or continuance of display of 'posters, placards, handbills, writings, pictures, or devices for advertising or other purposes';<sup>236</sup> and,

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(235) See reg 33(b); Burrows, op. cit. 349.

(236) See the Local Government Act 1974, s 684, paragraph 15; see also the Transport Act 1962, s 77(rr) (regulations may be made prohibiting or restricting the use of reflective material on signs, hoardings, and similar structures used for advertising purposes in such a position that they are likely to reflect the lights of motor vehicles on any road); the Town and Country Planning Act 1977, ss 92-93.

(b) no aircraft may be used for the towing of any banner or other object except in accordance with such procedures and under such conditions as may be prescribed by the Director of the Civil Aviation Division of the Ministry of Transport.<sup>237</sup>

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(237) See the Civil Aviation Regulations 1953, reg. 43(2). Pursuant to this regulation the Director of Civil Aviation has prescribed conditions for towing banners etc in Civil Aviation Safety Order Number 9, Part 1, section 5. This section does not deal with what is displayed on any banner etc and is directed exclusively at safety considerations; such as, the competence of the pilot, the times and height at which such towing operations may be undertaken, and the power of the aircraft.

### 3. CONCLUSIONS

#### (1) APPROACHES TO STATUTORY CONTROL

Different approaches to statutory control of advertising are embraced by the statutes which have been considered. It is proposed to consider these approaches in isolation in an endeavour to assess their effectiveness, or otherwise.

##### (a) The Consultative Approach

The Consumer Information Act 1969, which adopts this approach, has been described by R.J. Smithies, the Director of the Consumers' Institute as being a 'toothless laughing stock'.<sup>238</sup> This allegation is one of some substance in that no prosecution has ever been brought under the Act in spite of the fact that a significant number of complaints are lodged annually.<sup>239</sup> Even if it is argued that this number of complaints is not a sufficiently notable number and that, therefore, there is an extremely high level of voluntary compliance with the provisions of the Consumer Information Act 1969, it is suggested that a more cynical

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(238) 'Comment on Advertising', Unpublished Paper (1978); see also *Consumer* 145, 295.

(239) The number of complaints made on average per year over the past three years are as follows:

Advertising (s 9)	141
Price representations (s 10)	59

Source: Letter dated 12 July 1982 from J.H. Stothard, Office of the Examiner of Commercial Practices.

and, sadly, accurate evaluation would be that many of the provisions are ignored by less scrupulous advertisers, or are ignored by advertisers who are ignorant of their existence, and that these breaches go largely undetected and unpunished.<sup>240</sup>

One of the main reasons why no prosecution has ever been brought under the Act is that the Act directs that extensive and laborious consultative procedures be pursued before a prosecution is brought; that is, section 19(1) states that no prosecution may be brought without the leave of the Examiner. While the Minister of Trade and Industry may authorise an immediate prosecution for an offence under the Consumer Information Act 1969<sup>241</sup> such authorisation has never been granted and the normal procedure is that enshrined in section 19 of the Act which requires extensive consultation before leave to prosecute an alleged offence may be given. Consider the following hypothetical case.

Individual x complains to the local office of the Department of Trade and Industry alleging that a particular advertisement is misleading. The complainant would then be referred to the Consumer Services and Commercial Practices Division of the Department. This Division would then investigate the complaint to establish whether it was *prima facie* justified. If it was then investigators would then go to the advertiser concerned and in appropriate circumstances ask the advertiser to justify the advertisement. If they found that a breach of the Act warranted prosecution the matter would be

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(240) See, for example, *Consumer* 163,190; *Consumer* 158, 31; *Consumer* 157,351; *Consumer* 154,244; *Consumer* 145,292; *Consumer* 130,167; *Consumer* 120,207; *Consumer* 117,119; *Consumer* 115, 56; *Consumer* 114,9; *Consumer* 102,351; *Consumer Review* 4, 123.

(241) S.20(1).

referred to the Head Office in Wellington for their decision. Before any leave to prosecute may be given the following procedures must be adopted, viz:

- i) A notice in writing must be served on the alleged offender informing him of the alleged offence and the facts alleged to constitute the offence and inviting him to make his views known regarding the alleged offence. The alleged offender must be given at least 14 days to reply.
- ii) If the advertiser admits the offence and states that he is prepared to confer with the Examiner the Examiner must serve on that person a notice inviting him to confer with the Examiner with a view to entering into an agreement whereby the consequences of the offence in the future will be avoided. Once again, the advertiser must be given at least 14 days to prepare for this meeting.
- iii) If the advertiser agrees to confer with the Examiner, the Examiner may only give leave for a prosecution to be commenced if - a satisfactory agreement cannot be entered into; or, there has been undue delay in entering into an agreement and an agreement is not entered into within 14 days after the Examiner has served a written notice of his intention to give leave for the commencement of a prosecution; or, the Examiner decides that in all the circumstances the person should be prosecuted.<sup>242</sup> Therefore the minimum time span between the date of publication and commencement of any prosecution will be 28 days plus time for investigation and consultation. As Maclean<sup>243</sup> suggests, a more realistic time span for this would be 5 months.

Two consequences derive from these inordinate delays -

- (a) By the time all these consultative procedures have been completed the advertiser may well have withdrawn or be prepared to withdraw the offending advertisement in any event.

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(242) See the Consumer Information Act 1969, s 19.

(243) The Consumer and the Control of Advertising, Unpublished LL.M Thesis, University of Auckland, 1976, at pages 89-90. This writer points out that: "The statutory notices required to be given total 28 days and between the giving of the first notice and the giving of the second statutory notice negotiations that amount to undue delay must have taken place. The minimum time therefore between publication and prosecution must be in excess of four weeks and would probably realistically be in excess of five months."



(ii) An advertising campaign will affect a consumer and his behaviour beyond the life of a campaign. For example, a misleading claim about a particular product may create an impression in a consumer's mind about that product, and thereafter successive advertisements, even if they do not contain the misleading claims, may trigger a conscious or subconscious memory of the favourable but misleading claim. Furthermore a false or misleading campaign may lead to the appropriation of some market share which the false advertiser may retain for a considerable time, as where a deceptive claim reinforces or creates a particular brand loyalty.

While consultation is a commendable ideal it is submitted that the Consumer Information Act 1969 is unduly restrictive in specifying that, save with the Minister's consent, no prosecution shall be brought without the leave of the Examiner who, in turn, is obliged to follow the laborious procedure outlined in the Act before giving his consent. A discretion should be given to the Examiner to commence a prosecution immediately if he considers an immediate prosecution is justified or necessary. Furthermore, something must be done about the residual impact of false or deceptive advertising claims. The Examiner may, in any agreement entered into with the advertiser, endeavour to mitigate the consequences of the offence<sup>244</sup> and considerable scope exists for corrective advertising<sup>245</sup> i.e. affirmative

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(244) S 19(3).

(245) Infra, at 314 et seq.

disclosure of facts which had been misrepresented in prior advertising may be required. However, if the advertiser refuses to agree to such a measure the only avenue open to the Examiner is to permit a prosecution in respect of the offence.<sup>246</sup>

Finally, the absence of large numbers of complaints alleging breaches of the advertising provisions is indicative of consumer ignorance and/or apathy, and the Department of Trade and Industry, being charged with the administration of so many statutes and regulations,<sup>247</sup> cannot possibly mount an effective surveillance of advertising. Therefore, a vast number of advertisements that infringe the provisions of the Consumer Information Act 1969 are never questioned. The solution may lie in the establishment of a Consumer Affairs Department which would be more attuned to consumer legislation and have the time to devote to ensure its implementation; or, in affording the consumer a right of action to recover damages for any loss that he suffers as a result of any breach of the Act's advertising provisions. It is interesting to note that the consultative procedures as embodied in the Food and Drug Act 1969 have been abandoned in the Food Act 1981 and the Medicines Act 1981, respectively.

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(246) S 19(5) (c) (i).

(247) For a breakdown of the extensive responsibilities of the Department refer to any recent Report of the Department of Trade and Industry to the House of Representatives.

(b) Pre-publication surveillance or vetting

As mentioned above, the Animal Remedies Act 1967 establishes an Animal Remedies Board that exercises control over the manufacture, importation, sale, advertising claims and use of animal remedies, ensures that chemicals may be safely used and are efficient, and issues licences to manufacturers of proven effective products. Each manufacturer gives the Board information about the effectiveness of his own product and this information must be substantiated. Usually, local and overseas laboratory and field trial results will be cited, and these are often backed up by local production - response and toxicity trials. No advertisement in respect of an animal remedy may be published unless prior approval of the advertisement has been obtained from the Animal Remedies Board.<sup>248</sup> The Board, being in possession of detailed information regarding the product, is in an excellent position to evaluate the advertising claims, and may decline approval if any false, inaccurate, misleading or exaggerated claim is made.

This approach has considerable advantages in that consumers are not exposed to misleading or deceptive claims and advertisers have the security of knowing that the advertisement has the approval of an independent and expert body.<sup>249</sup> The extension of this approach of pre-publication

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(248) S.41(1).

(249) An analogous approach is adopted in Israel under the Standard Contract Law 1964 (5724). A system is set up whereby restrictive standard form contracts may be submitted voluntarily to an administrative tribunal for vetting. If the tribunal approves the standard form contract that contract is not generally reviewable by the Courts, who under the same Act, are given extensive powers to invalidate unfair dispositions. See Deutch, Unfair Contracts (1977), 245.

surveillance or vetting of advertisements to all advertisements would be ideal, but totally impractical. The number of people required to implement an across-the-board monitoring function would be astronomical and the associated expense would be prohibitive. However, as a compromise consideration could be given to the idea of advertisement substantiation.

In the United States the Federal Trade Commission has initiated an advertisement substantiation programme in an attempt to ensure the existence of a reasonable basis for advertising claims.<sup>250</sup> The programme requires advertisers to prepare substantiation for their claims prior to dissemination and to produce this documentation at the FTC's request.

Which advertisers are required to provide substantiation depends on a number of policy considerations including

"...advertising dollar volume, advertising to sales ratios, industry size, industry concentration, consumer vulnerability and the degree of investment the consumer will make in the advertised product."<sup>251</sup>

The FTC has emphasised that substantiation will generally only be required of 'major advertising themes which appear to be the most suspect and to have the greatest impact on buyer decisions'.<sup>252</sup>

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(250) See 36 Fed.Reg.s.12,058 (1971). See also Notes, "The FTC Ad Substantiation Program", (1973) 61 The Georgetown Law Journal 1427. In Australia, the Report of the Joint Parliamentary Committee on The Prices of Household Soaps and Detergents (1974), para 142, has recommended that a similar programme be established and developed to help combat unsubstantiated claims prevalent in the Australian Soaps and Detergent Industry.

(251) 'The FTC Ad Substantiation Program', *ibid*, 1435.

(252) 2 Trade Reg Rep, s.7573, at 12, 181-3 (FTC 1974).

The aim of this substantiation programme is twofold: that is, (i) it enables the FTC to evaluate the data supplied and facilitates the detection of unsubstantiated claims; and, (ii) data supplied may be made public thereby assisting consumers to make a rational choice as between competing claims.<sup>253</sup>

In respect of the first objective, if the submitted documentation is unsatisfactory the FTC has power to declare the unsubstantiated advertisement to constitute an unfair and deceptive act within the meaning of section 5 of the Federal Trade Commission Act.<sup>254</sup> Removal of the unsubstantiated advertisement from circulation with, or without, the additional sanction of an order of corrective advertising might follow.

The test that the FTC has adopted in relation to substantiation is that any product claim must rest upon a 'reasonable basis'. Thus in *Firestone Tyre and Rubber Co.*<sup>255</sup> the respondent company's claim that their Super Sport Wide oval tyres 'corner better, run cooler and stop 25% quicker' was challenged by the FTC. The respondent company supplied data and tests that showed these tyres did stop 25% quicker in exceptionally icy road conditions, but no tests were performed on other types of road surfaces that could be called

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(253) Duggan, 'Fairness in Advertising: In Pursuit of the Hidden Persuaders', (1977-78) 11 Melbourne University Law Review 50, 72.

(254) Idem.

(255) 3 Trade Reg. Rep. s 20,112, s 20,069 (FTC 1972).

normal driving conditions. Thus, the issue was whether the respondent company's tests, limited to icy road circumstances, was an adequate scientific test substantiating a generalised claim of 25% better stopping capability. The FTC concluded that the respondent's limited test did not amount to a reasonable basis to substantiate the claim made in the advertisement.<sup>256</sup>

Failure to provide adequate data exposes the advertiser to the charge that his advertising is unfair and deceptive and, as such, is in breach of section 5.<sup>257</sup>

The second objective of advertising substantiation rests upon the rationale that access to adequate information is a pre-requisite for a competitive market and rational consumer choices. The Commission has enumerated a number of policy considerations that will determine its decision whether or not to make data supplied available for public inspection; namely, (i) whether public disclosure can assist competing claims; (ii) whether the public's need is being met voluntarily by advertisers; (iii) whether public disclosure can enhance competition; (iv) whether the knowledge that such information will be made public will encourage advertisers to actually substantiate their claims by testing

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(256) See also Pfizer Inc. 3 Trade Reg. Rep. s 20,056;  
City Investing Co. 3 Trade Reg. Rep. s 20,451,  
K Mart Enterprises Inc. 3 Trade Reg. Rep. s.20,661.

(257) Federal Trade Commission Act (supra).

before making them; and (v) whether the Commission's limited ability to detect section 5 violations because of its limited resources, can be expanded by public disclosure of this information.<sup>258</sup>

One of the major advantages of this programme is that it reverses the onus of proof. As Duggan<sup>259</sup> explains

"Complaints will be substantiated against advertisers unless they can establish, in documentation submitted in response to Commission orders, that the claims in issue were supported by competent and reliable scientific tests."

The reliability of advertising may be enhanced if advertisers are compelled to ascertain in advance the accuracy of their intended claims. Furthermore the programme makes available a vast quantity of comparative information to consumers who avail themselves of the opportunity provided to inspect data submitted to the Commission.

However, critics of the substantiation programme maintain that the data submitted is often too technical for consumer review, or even review by the Commission.<sup>260</sup> To remedy this problem the Commission announced in 1972 that all substantiation documentation must be submitted with 'plain language summaries'. Opponents of the programme also argue that it will cause a shift away from informative advertising to advertising using bland platitudes and 'puffs' which avoids saying anything in essence, thus evading the

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(258) 36 Fed. Reg. 12,058 (1971).

(259) Op.cit. 73.

(260) 'The FTC and Substantiation Program', op.cit., 1437.

advertisement substantiation requirement. This argument may be countered by saying that the consumer is better off without any information about a product than he is with misleading or possibly false information,<sup>261</sup> but this argument in rebuttal is too simplistic. The costs and benefits of any programme or device to control misleading advertising must be balanced, and it may well be that the costs of substantiation outweigh the benefits of disclosure. As one writer argues

"[V]igorous enforcement of [advertisement substantiation] might have less of a preclusive effect on false and deceptive advertising, which is already prohibited, than on truthful claims that are too expensive to substantiate".<sup>262</sup>

Moreover, the success of the second objective of the advertisement substantiation programme, namely, the dissemination of detailed product information, depends on a significant number of consumers inspecting data that the Commission makes available. However this has not been the experience in the United States and the costs associated with the search will usually outweigh potential benefits in respect of low cost items.<sup>263</sup>

It may well be that advertisement substantiation amounts to 'an appealing idea of uncertain value',<sup>264</sup> but it is nevertheless an idea that merits some attention in New Zealand.

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(261) Ibid, 1439.

(262) Pitofsky, op.cit. 683.

(263) Duggan, 'The Great Soap Opera' (1978) 11 Melbourne University Law Review 467, 497.

(264) Pitofsky, op.cit. 683.



(c) Strict Liability v Proof of Fault

The Medicines Act 1981 and the Food Act 1981 create offences of strict liability in respect of breaches of the advertising provisions in the respective Acts.<sup>265</sup> The predecessor of these Acts, the Food and Drugs Act 1969, also made an offence against the provisions of the Act one of strict liability but that Act made prosecution a measure of last resort, and provided that the normal procedure should be consultation and negotiation between the offender and the examiner from the Department of Health.<sup>266</sup> While this "buffer" of consultation is not reproduced in either the Food Act 1981 or the Medicines Act 1981 it is submitted that the weaknesses associated with consultative procedures, as evidenced by the ineffectiveness of the Consumer Information Act 1969, coupled with the potential harm to consumers of misrepresenting the qualities or purposes of certain foods and medicines, justify a strict liability approach in this area with immediate prosecution of any offence.

Conversely the Consumer Information Act 1969 does not make it clear whether or not section 18, which makes it an offence to act in contravention of or fail to comply with any provision of the Act or the regulations made pursuant to the Act, imposes strict liability or not. In

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(265) Food Act 1981, ss 11(3), 30; Medicines Act 1981, ss 57(4), 58(2), 80.

(266) Food and Drug Act 1969, s 34.

light of this uncertainty the Courts could adopt the approach of the House of Lords in *Sweet v Parsley*<sup>267</sup> and resolve the issue in favour of any defendant; that is, that a court should be reluctant to conclude that an offence is one of strict liability in the absence of good reason for so concluding and in the absence of clear expression of such intent by Parliament.<sup>268</sup> The Animal Remedies Act 1967, section 41(7), provides that only a person who "wilfully publishes" an advertisement in contravention of the advertising provision may be convicted. The term "wilfully" has been less than consistently interpreted<sup>269</sup> but it is submitted that in this context it must be taken to import a requirement of *mens rea*. This is a not unreasonable attitude to adopt in circumstances where the advertiser has had to submit his advertisement for appraisal prior to publication; a departure from the approved version would be difficult to explain.

A compromise is achieved in the Merchandise Marks Act 1954 in that *mens rea* is required but the onus of proof is reversed.<sup>270</sup> It is for the offender to prove

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(267) [1970] AC 132.

(268) Ibid, 149; see also *R v Strawbridge* [1970] NZLR 909; *Police v Creedon* [1976] 1 NZLR 571 (McCarthy P at 573-575, and Cooke J, at 585-586, stress that in a case of uncertainty the presumption in favour of *mens rea* should apply); *R v City of Sault Marie* (1978) 85 DLR (3d) 161; *Ministry of Transport v Burnetts Motors Ltd* [1980] NZLR 51, 58.

(269) See Smith and Hogan, *Criminal Law*, (4 ed, 1978) at pages 104-105, and the cases there cited.

(270) S 9.

that he acted without "intent to defraud" if he wishes to escape liability. Similarly a defendant may escape prosecution for an offence under the Credit Contracts Act 1981 by proving that he or his servant had no knowledge of the advertisement before it was made or that he took all steps reasonably possible to prevent its dissemination.<sup>271</sup> The Food Act 1981 and the Medicines Act 1981 also excuse any person who can prove that he did not intend to commit an offence and took all reasonable steps to ensure compliance.<sup>272</sup>

Gordon Borrie, the Director General of Fair Trading in the United Kingdom, commented recently<sup>273</sup> that

"Much of consumer protection legislation creates strict liability offences and it can seem unfair for a trader to be convicted for an offence when no intent or recklessness on his part has been proved".

While this is undoubtedly true, strict liability does ensure that there is high standard of compliance and that it is not impossible for a prosecution to establish a case. Acts

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(271) S 38.

(272) See, ss 30, 80 respectively. It is interesting to note that this approach is mirrored to a certain extent in cases involving other regulatory offences; for example, in *R v City of Sault Ste Marie*, supra, the City had been charged with polluting a river contrary to the provisions of the Ontario Water Resources Act 1970. The City accepted that there had been a discharge but sought to deny liability claiming that it was the fault of an independent contractor. The Supreme Court of Canada ruled that a defence of absence of fault was available in respect of a strict liability offence, with the onus being upon the defendant to establish such absence on a balance of probabilities. Generally see Cato, 'Strict Liability and the Half-Way House', [1981] NZLJ 294.

(273) 'Laws and Codes for Consumers', [1980] Journal of Business Law 315, 320.

such as the Food Act 1981, the Medicines Act 1981 and the Credit Contracts Act 1981 strike the ideal compromise in that the offender may escape liability by negating intent or recklessness and yet the onus is not on the prosecution to demonstrate the existence of such elements.

## (2) INFORMATIONAL CONTENT OF ADVERTISEMENTS

Advertising has as its primary objective the promotion of sales in respect of goods and services and therefore information that is transmitted in any advertisement must, of necessity, be in harmony with this objective. It would not be in the interests of a cigarette manufacturer to impart information relating to alleged health dangers arising out of smoking unless, of course, he chose to emphasise that the low tar properties of his brand of cigarettes minimised those health risks. This serves to highlight the following points about advertising and informational content; namely, (i) the information that is given is not likely to be anything other than partisan in nature; (ii) while advertisements may be said to persuade and inform it is clear that the latter objective is subordinated to the former, and; (iii) information that is given is incomplete and selective. Furthermore, very little information is capable of verification by reference to any kind of objective criteria.

As Trebilcock explains<sup>274</sup>

"Today, I am encouraged to buy my breakfast cereal because it "snaps, crackles and pops", my coke because it is "the real thing", my floor cleaner because it is a "white tornado", my Buick because it is "something we believe in."

Given the premise that the existence of adequately informed consumers is a pre-requisite for workable competition<sup>275</sup> what can be done about the content of advertisements?

The Statutory provisions discussed above have as their main thrust the control of misleading and deceptive advertisements and very little attempt it made to bolster the informational content of advertisements. This is not to suggest that no attempt has been made in this direction. For example, in the Credit Contracts Act 1981 the legislature has opted for a compromise in that an advertiser is obliged to disclose the finance rate in any advertisement that indicates the rate of interest or other charges, but where he is silent as to the rate of interest or these other charges there is no requirement that he give the finance rate.<sup>276</sup> That the Legislature stopped short of compelling advertisers to incorporate the finance rate in all advertisements demonstrates the type of difficulty inherent in any policy of mandatory disclosure; that is, it is not possible to give the finance rate in certain

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(274) 'Consumer Protection in the Affluent Society' (1970) 16 McGill LJ 263, 282.

(275) See Introduction, supra.

(276) S 36 (as amended by the Credit Contracts Amendment Act 1982, s 5).

circumstances as where the computation of this rate depends upon the particular debtor and his credit worthiness. Other examples of compulsory disclosure of information in advertisements include: (i) disclosure of the true name of the advertiser in any medical advertisement,<sup>277</sup> (ii) the disclosure of the fact that a pesticide has been registered in any advertisement for such a product<sup>278</sup>; and, (iii) an advertisement for an animal remedy must give the Licence number of the remedy.<sup>278A</sup> Furthermore, as I shall discuss, mandatory disclosure has found statutory approval outside the advertising arena.<sup>279</sup>

Mandatory disclosure of information in advertisements runs into several obstacles. Not only are there complications of the type encountered with disclosure of the finance rate in credit advertisements, namely, that it is impossible to frame provisions that cover the myriad of diverse circumstances that exist, but it may be practically impossible for an advertiser to effect full disclosure of required information. Given that an average television advertisement is of 30 seconds duration, an advertiser would be hard pressed to give any "hard" information in that time. Furthermore, the disclosure of

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(277) Medicines Act 1981, s 59.

(278) Pesticides Act 1979, s 40(2).

(278A) Animal Remedies Act 1967, s 41(6).

(279) Infra. For example in mandatory disclosure of the terms of a credit contract, in packaging and labelling legislation and under the Motor Vehicle Dealers Act 1975.

information must be in a form that renders it intelligible to the average consumer and the provision of detailed scientific data and information about tests is not likely to improve the perception of the hypothetical reasonable person. It has been suggested that these complications may be overcome if disclosure is confined to 'information directly contrary to a factual impression conveyed by an advertisement...when it is likely to affect the consumption decisions of a substantial number of persons'.<sup>280</sup> As Blakeney and Barnes<sup>281</sup> point out this fails to take into account the fact that obligatory amplification of information contained in advertisements would be of little benefit where image advertising is concerned and where emulation of an exciting life style is the main selling point. Notwithstanding these complications the following approaches towards improving the informational content of advertisements merit some mention.

(a) Free counter-advertising

Turning yet again to the United States, the Federal Communications Commission<sup>282</sup> recognises the so-called "fairness" doctrine whereby broadcasters are under a duty to broadcast issues of public importance, and to broadcast

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(280) Note, 'Fairness and Unfairness in TV Product Advertising', (1978) 76 Michigan LR 498, 526.

(281) 'Advertising Regulation in Australia: An Evaluation', [1982] Adelaide LR 29, 32.

(282) The Communications Act 1934, 47 USC 301, consolidated regulatory control of 'communications by wire and radio' under the Federal Communications Commission.

conflicting views on these issues.<sup>283</sup> The doctrine thus incorporates the dual concepts of required and balanced presentation. In 1946 the applicability of the doctrine to commercial advertising was considered in *In Re Sam Morris*,<sup>284</sup> a case involving a radio station's refusal to sell commercial time for the broadcasting of advertisements advocating abstinence from alcohol.

The Commission stated:

"Difference concerning the relative merits of one product over another does not usually divide the community by raising basic and important social, economic or political issues. But it must be recognised that under some circumstances it may well do so...[and]...this controversy...may assume the proportions of a controverted issue of public importance. The fact that the occasion for the controversy happens to be the advertising of a product cannot serve to diminish the duty of the broadcaster to treat it as such as an issue".<sup>285</sup>

In *Banzhaf v FCC*<sup>286</sup> the United States Court of Appeals for the District of Columbia ruled that because cigarette smoking poses a pervasive health hazard, radio and television stations must provide reasonable time to anti-smoking organisations to publicise their viewpoints.

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(283) See Simmons, 'Commercial Advertising and the Fairness Doctrine: The New FCC Policy in Perspective' (1975) 75 Columbia LR 1083, 1086; Notes, 'The Fairness Doctrine and Access to Reply to Product Commercials', (1976) 51 Indiana LJ 756.

(284) 11 FCC 197 (1946).

(285) Ibid, 198-199.

(286) (1968) 405 F 2d 1082.



The Federal Communications Committee demonstrated considerable reluctance in extending the 'fairness' doctrine in the field of product advertising,<sup>287</sup> however, and in 1974 the Commission ruled that simple product promotion is no longer subject to the fairness doctrine unless the advertisement affirmatively discusses a controversial public issue.<sup>288</sup> The Commission presented four reasons for this conclusion. First, it was thought more appropriate for the legislature to determine whether products are dangerous to health or otherwise detrimental to the public interest, and to take appropriate steps to publicise their findings or restrict distribution of those products. Second, the Commission thought that extensive application of the fairness doctrine to product commercials would have disastrous economic consequences for broadcasting; for example, 'valuable free time would have to be given up for rebuttal programming',<sup>289</sup> and the cost of advertising might increase considerably to cover the free advertising time.<sup>290</sup>

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(287) For example, in *In Re Friends of the Earth* (1971) 449 F 2d 1164 the Commission dismissed a fairness doctrine complaint alleging a failure to present balanced coverage of air pollution caused by large combustion engines, and endeavoured to distinguish the *Banzhof* case. The Court held that <sup>the</sup> two situations were indistinguishable. See Simmons, loc.cit. 1096.

(288) Federal Communications Commission, 'Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues', 39 Fed Reg 26,372 (1974).

(289) Simmons, loc.cit., 1110.

(290) Trebilcock, 'Private Law Remedies for Misleading Advertising', (1972) 22 University of Toronto LJ 1,30, comments that counter-advertising would double 'the advertising component in the cost structure of products because, presumably, the media would need to double the advertiser's bill in order to pay for the other side's air time. Thus the consumer would end up having to foot greatly increased advertising costs'.

Thus the FCC suggested that by applying the fairness doctrine to standard product and service advertisements it would infringe unnecessarily upon a broadcaster's constitutional freedom of speech. Fourth, the application of the fairness doctrine to product advertising was not going to contribute much to the underlying issue, i.e., issues of public importance to consumers merit full discussion and not short counter-advertising imposed by the fairness doctrine.

Undoubtedly counter-advertising possesses the potential to enhance the informational content of advertisements, but in the end result the consumer will pay heavily for this information. For example, if the New Zealand media were under a statutory obligation to provide free counter-advertising where controversial issues of public importance are raised by commercial advertising their rates of advertising would rise rapidly to cover this "free" air time. Advertisers would undoubtedly pass these increased costs on to the consumer *via* increased prices. Even where counter-advertising is paid for by the advertiser who disagrees with the original advertiser these costs will fall on the consumer where that counter-advertiser is in the business of selling goods and services as such additional costs will be reflected in the prices that he sets for consumers of his products or services. Thus, counter-advertising is not an attractive remedy for informational deficiencies in advertising - there is no such thing as "free" counter-advertising from the consumer's point of view.

(b) Promulgation of Information Standards

Even accepting the difficulties inherent in legislating for informational content there is considerable room for improvement. For example:

(1) Price information. Some advertisements do not indicate the price for which advertised products may be purchased. It would be of considerable benefit to consumers and no great imposition on advertisers if mandatory disclosure of the price in all advertisements for goods was required. Such a rule in relation to services would be unworkable in most cases in that <sup>the</sup> type of job involved may dictate the price. The rule could, however, be extended to mandatory disclosure of "hourly rates" in respect of the provision of services.

Furthermore, where comparative price advertising is employed there is much scope for clarification. The reference price, whether it is described as the "normal", "usual", "suggested retail price" or "manufacturers recommended price", is too often fictitious or unrealistically inflated so as to create the impression of an apparently generous reduction. Therefore it is recommended that comparative price advertising be restricted in the following ways:

(i) That no price comparisons be permitted with a recommended or suggested retail price by a person who supplies goods at retail or who supplies services. Standard supermarket advertising practice in New Zealand is to use suggested retail prices as reference prices and

while many of these suggested retail prices are genuine attempts to set a market price, it is abundantly clear that many supermarkets never charge, nor contemplate charging, anything like the suggested retail price for certain lines of goods, and this artificially high price is simply used to create the impression of substantial savings. Given that it would be impossible to determine which recommended or suggested retail prices are genuine, the only recourse is to prohibit the use of such, or similar, recommended prices in comparative price advertisements.

(ii) Advertised reductions below "usual" or "normal" prices must be genuine. At present, the Consumer Information Act 1969 would catch any false indications that goods are being supplied at or below a previous price, or at a price less than a previous price by a specified amount;<sup>291</sup> for example, where the normal price is a product of the advertiser's imagination.<sup>292</sup> However, there is nothing to prevent an advertiser who owns two or more retail outlets from indicating a reduced price in retail outlet A when the higher price in fact obtained in outlet B, which may not only be a considerable distance away but may also be in an area where retail margins are normally higher.<sup>293</sup> This position could be regulated by requiring (i) that the "usual" or "normal" price be the price that prevailed

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(291) Consumer Information Act 1969, s 10(2).

(292) See *Consumer* 190, 335 for an example of misleading price "reductions" on sewing machines.

(293) See Lawson, Advertising Law (1978), 246.

generally, or if this is not the case, the advertiser should be under an obligation to disclose the locality where the price did obtain; and (ii) the price must have prevailed for a reasonable time. It is submitted that the adoption of provisions to the above effect would improve both the quality and quantity of information relating to prices and that this would have a beneficial impact on competition.

(2) Information relating to product quality. There is extensive use of product safety standards in New Zealand, so the question arises: Why isn't there like provision for product information standards? For example, in respect of a motor vehicle an advertiser might be placed under an obligation to incorporate certain particulars in the advertisement for such a product; such as, the price, the vehicle's fuel consumption, the nature and brief details of any manufacturer's warranty, and certain safety information; e.g. whether rear seat belts are fitted etc. Palmer<sup>294</sup> suggested in 1975 that a Products Safety Commission be established charged with the responsibility of administering a Products Safety Act. Primary functions of this Commission would be to formulate products safety standards and products information standards.<sup>295</sup> As regards products safety standards, consumers are well served in New Zealand already in that the Standards Association, an

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(294) 'Dangerous Products and the Consumer in New Zealand', [1975] NZLJ 366.

(295) Ibid, 378-379.

independent organisation established under the Standards Act 1965, has promulgated or endorsed over 2,400 standards for particular products or designs.<sup>296</sup> While safety is the dominating consideration in the preparation of New Zealand standards, a New Zealand standard also has reference to factors such as performance, quality, durability, origin or composition and before a standard is established a detailed study by a project committee of experts is conducted and ample opportunity is afforded for comment by the public and interested groups on a draft that is prepared.<sup>297</sup>

While this writer would not be in favour of the creation of a Products Safety Commission,<sup>298</sup> it is recommended that a Consumer Affairs Department assume responsibility, *inter alia*, for the establishment of product information standards to be prescribed by regulation. This Department would have access to the extensive information of, and tests conducted by, the Standards Association and would be in a good position to order that certain performance and safety information be incorporated in any advertisement for

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(296) 'The 2400 - plus technical standards may be product specifications such as those for electrical appliances, Christmas tree lights, safety footwear, aluminium windows or PVC pipe; they may be in the form of safety requirements for power mowers or plants for mechanical refrigeration etc', see Standards, (Vol. 27, No. 7) at page 10.

(297) See Mansell, 'The Use of Standards in New Zealand Law', (1980)10 Victoria University of Wellington LR 333, 334.

(298) The main reason being that I am of the opinion that a move should be made away from fragmentation of control in the consumer protection field. Rather than create another regulatory body I am in favour of the establishment of a Consumer Affairs Department with overall control and responsibility for consumer protection. See Chapter VI, Conclusion, infra.

specified products. Furthermore, where any standard exists in respect of a particular product a person advertising the supply of such goods at retail should be under an obligation to disclose whether the product meets the New Zealand Standard for such a product.<sup>299</sup> Provision of more information relating to quality would promote competition and considerable incentive for improvement would be engendered amongst manufacturers whose products did not meet the relevant New Zealand Standard for the product concerned.<sup>300</sup>

In conclusion, therefore, it is suggested that the informational content of advertisements may be improved by the promulgation of information standards. Recognising that the provision of too much information is self defeating and impractical, emphasis should be placed on mandatory disclosure of accurate price information and on dissemination of salient details relating to quality and

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(299) Certain standards have legal effect, of course, in that they are incorporated in statutes and regulations and marketing of sub-standard products may be prohibited; e.g. protective helmets for motor cyclists, safety glass for motor vehicles and car seat belts are all required to comply with standard specifications under the Traffic Regulations 1976. Furthermore, the various statutes and subordinate legislation governing packaging and labelling prescribe that certain information be contained on packages and labels of miscellaneous goods, and these goods must meet certain product standards. See Chapter V, Disclosure of Information, infra.

(300) The Trade Practices Act 1974 (Australia), s 63(2), provides that information standards as are reasonably necessary to give persons using goods accurate information as to the quantity, quality, nature or value of goods may be established. Civil and criminal liability may be imposed on any person who supplies goods without the designated product information. Generally, see Blakeney and Barnes, loc.cit., 45-46.

performance. As regards the disclosure of information relating to quality and performance, regulations would have to be on a product by product basis, in that it would be impossible to draft regulations of sufficient specificity that would cover the range of products on the market.

### (3) CORRECTIVE ADVERTISING

No discussion of statutory regulation of advertising would be complete without a consideration of corrective advertising. In the United States the Federal Trade Commission is the primary government regulator of advertising and its authority is derived from section 5 of the Federal Trade Commission Act,<sup>301</sup> which reads in part:

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful".

Under this vague standard the Commission is given a great latitude to select a strategy of regulation that it considers would most effectively prevent deceptive advertising and the resulting harm to consumers and distortions in competition. The primary Federal Trade Commission (FTC) remedy is a cease and desist order;<sup>302</sup> that is, when the Commission, as a result of an

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(301) 15 USC 45 (1970), as amended 15 USC 45 (Supp.IV, 1974)

(302) Federal Trade Commission Act, s 45(b).



investigation has reason to believe that any advertiser is using an unfair or deceptive act or practice in commerce, it will first attempt to induce the advertiser to voluntarily enter into a consent order to cease and desist the illegal practice;<sup>303</sup> if the FTC is unable to obtain a consent order it then files a complaint which is heard by an administrative law judge who must file a decision within 90 days of the receipt of all evidence.<sup>304</sup>

Corrective advertising is a remedy whereby an advertiser found to have engaged in false, misleading or unfair advertising would be required not only to cease and desist from such practices in the future, but also to disclose the facts which had been misrepresented in the prior advertising; that is, a corrective advertisement consists of an acknowledgement that previous advertisements were deceptive and endeavours to correct the misconceptions they created.<sup>305</sup> Two major reasons are said to underlie corrective advertising, namely;

i) An advertising campaign will affect the consumer and his behaviour beyond the life of the campaign. Thus the traditional cease and desist order which amounts to a direction to 'go and sin no more' is ineffective in completely eliminating the deception. For example, a

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(303) Ibid; see also Cox, Fellmeth and Schulz, 'The Nader Report' on the Federal Trade Commission (1969), 39-43.

(304) Ibid. From this decision either party may appeal to the Full Commission, and respondent may appeal further to the Court of Appeals, and from there either party may petition the United States Supreme Court for a writ of certiorari.

(305) See for example: Pitofsky, 'Beyond Nader: Consumer Protection and the Regulation of Advertising' (1977) 90 Harvard Law Review 661, 692.

misleading claim in respect of a product may create an impression in the consumer's mind about that product and thereafter successive advertisements, even if they do not contain the misleading claims, may trigger a conscious or sub-conscious memory of the favourable but misleading claim. Consequently one of the primary functions of corrective advertising is to dissipate the adverse effects of false or misleading advertising by alerting the consumer that he has been acting on erroneous information in the hope that his future practices will not be influenced by the deceptive advertisement.<sup>306</sup>

ii) A false or misleading advertising campaign may result in the appropriation of some market share which the false advertiser will most likely retain until such time as consumers are informed of the misinformation upon which they based their decisions to purchase.<sup>307</sup> For example the development of brand loyalties may be influenced by a deceptive claim and for several years the advertiser may reap the benefits and continued sales based on the initial deception.

Consequently corrective advertising aims to eliminate the influences of deceptive claims from future consumer behaviour and seeks 'to deprive illegal advertisers of the unlawful fruits of their violations...'.<sup>308</sup>

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(306) Ibid, 696.

(307) Thain, 'Corrective Advertising: Theory and Cases' (1973) 19 New York Law Forum 1, 18.

(308) Pitofsky, loc. cit. 696.

Corrective advertising as a remedy has been sparingly used and although it was first mooted in 1969<sup>309</sup>, it was only in 1975<sup>310</sup> that the Commission finally imposed the remedy in a litigated case.<sup>311</sup> This reticence stems from the restricted view as to when the remedy may appropriately be employed. As the FTC explained in *Warner-Lambert Co.*<sup>312</sup>

"[I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.<sup>313</sup>

The following factors may be identified as necessary prerequisites for the order of corrective advertising:

i) The advertisement complained of must have residual impact. In *Sun Oil Co.*<sup>314</sup> the respondent company showed an advertisement in which a car fueled with "Sunoco 260" petrol

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(309) *Campbell Soup Co.* [1967-1970 Transfer Binder] Trade Reg Rep 19; 261; 21421 (FTC 1970).

(310) *Warner Lambert Co.* [1973-76 Transfer Binder] Trade Reg Rep 21,066 (FTC 1975).

(311) Numerous corrective advertising orders have been issued as part of consent orders. See for example, Thain, loc. cit., 2-17.

(312) Op. cit.

(313) Underlining is mine.

(314) 3 Trade Reg Rep 20, 658 (FTC 1974).

pulled a freight train weighing over 100 tons. The representation was made that "Sunoco" alone could provide such high performance because its 260 brand is the 'world's highest octane gasoline'. While the Administrative Law Judge found it deceptive to advertise the octane rating as indicative of power, he saw no residual injury upon which the corrective advertising order could be predicated. His reasoning was that since the energy crisis began 'power is no longer the theme of gasoline promotions' and motorists no longer associate octane with power, or even consider it important.<sup>315</sup> Furthermore, it was held that the burden of proof is on the FTC to demonstrate the existence of a residual effect - no easy task!

ii) The advertisement must be false, misleading or deceptive in a material respect. As Pitofsky suggests<sup>316</sup>

"[A] corrective message for an insignificant fraud (for example, that a car gets only twenty four miles per gallon rather than the claimed twenty five) or for a false claim of marginal significance in most consumers' purchasing decisions (e.g. domestic origin claims or testimonials by celebrities who do not use the product) would impair rather than assist a consumers ability to make purchasing decisions".

Furthermore it is doubtful whether corrective advertising is an appropriate remedy where only a small number of the population is deceived. In *Feil v FTC*<sup>317</sup> another remedy,

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(315) Idem.

(316) Loc. cit. 698.

(317) 285 F 2d 879 (9th Cir. 1960).

affirmative disclosure, was ordered in circumstances where the Commission had only to show that three per cent of the audience were deceived and in *Charles of the Ritz Distributors Corp. v FTC*<sup>318</sup> it was held that the FTC is empowered to protect the 'ignorant, the unthinking and the credulous', regardless of their numbers. However, in the case of corrective advertising the advertiser could argue strongly that (a) he should not be forced to confess past illegal acts in the advertising media where only a small number of consumers have been deceived, as this might cause him to lose sales to those who were not originally deceived, and; (b) that a corrective message designed to clear up the misconceptions of a few is more likely to be confusing and useless to the majority. This question awaits final resolution but it may be that the courts will require deception in a more material respect, that is, either in the nature of the deception itself, or in the number of consumers deceived before corrective advertising is ordered. Other significant factors influencing the order of corrective advertising are succinctly enumerated by Thain<sup>319</sup> in the following terms:

"(F)actors to be considered include whether the claims are such that consumers cannot determine the honesty of the representations by themselves (e.g. nutritional, efficacy, or safety claims; the size and characteristics of the audience; the sales volume and market positions of the advertiser; the kind of product advertised; the blatancy of the deception; and the potential danger to the health and safety of the consumer)."

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(318) 143 F 2d 676 (2d Cir. 1944).

(319) Loc. cit. 24.

The type and content of corrective advertising orders may vary greatly, but generally advertisers are obliged, either (a) to discontinue advertising for a period of time, usually one year, or; (b) to disseminate a corrective message that accounts for a stipulated percentage of the advertiser's budget for a period of one year.<sup>320</sup> For example, in *ITT Continental Baking Co.*<sup>321</sup> the respondent company was obliged to allocate twenty-five percent of advertising expenditures for each medium in each market for one year to the dissemination of the corrective message, and in *Warner-Lambert Co.*<sup>322</sup> an even more stringent requirement, that the respondent include a corrective message in all product advertising until it had expended an amount equal to its average annual advertising budget over a ten year period, was imposed.

Provision also exists in Australia for affirmative disclosure and corrective advertising in that Section 80A of the Trade Practices Act 1974 empowers the Federal Court of Australia on the application of the Trade Practices Commission or the Minister of Business and Consumer Affairs to order a person who has contravened the consumer protection provisions of the Act to publish corrective advertisements or to make affirmative disclosures. However the Federal Court has not yet made any orders

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(320) Pitofsky, loc.cit. 700.

(321) 3 Trade Reg. Rep 19, 681

(322) Supra.

under s.80A and its comments in *Trade Practices Commission v Annand & Thompson Pty Ltd*,<sup>323</sup> in which an application for an order was refused, suggest that the remedy may be limited to circumstances much like those outlined above in the consideration of this remedy in the United States. Fisher J suggested<sup>324</sup> that

"...(T)here is no justification for making an order under that section unless there is reason to believe that the respondent has engaged on a number of occasions in the relevant conduct, which conduct in each instance is misleading or deceptive without being substantially dependent on the circumstances of the occasion. Alternatively an order under s.80A is appropriate if a uniform course of conduct, whether by way of advertising or use of documents, or otherwise, has occurred. Moreover, there must be evidence from which it can be inferred that it is likely that a number of people have been misled or deceived and are likely to be unaware of such ...deception or of their remedies."

Furthermore Blakeney<sup>325</sup> points out that the utility of orders under section 80A is severely circumscribed by the statutory limit of \$50,000 on the amount of corrective advertising that may be ordered in relation to any one contravention or group of contraventions. As that writer suggests that amount would be expended in paying for one sixty second prime-time commercial and therefore it is difficult to see how such orders could effectively counter the residual effects of long term misleading advertising campaigns.<sup>326</sup>

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(323) (1979) 25 ALR 91.

(324) 'Affirmative Disclosure and Corrective Advertising Orders under Section 80A of the Trade Practices Act 1974', (1978) 10 Comm L Ass Bull 63.

(325) *Ibid*, 115.

(326) *Idem*.

No provision exists in New Zealand law whereby affirmative disclosure or corrective advertising may be ordered. As mentioned earlier,<sup>327</sup> the Examiner of Commercial Practices, in negotiating an agreement with a person who has breached one or other of the advertising provision of the Consumer Information Act 1969, may endeavour to persuade the offender to publish corrective advertisements to mitigate the consequences of the offence.<sup>328</sup> However the Examiner could not compel the offender to effect such disclosure and everything hinges upon agreement. Thus it is suggested that consideration be given to the adoption of the corrective advertising remedy in New Zealand for the following reasons:

- 1) Corrective advertising is a powerful remedy and properly developed can fulfil a vital role in dispelling any misconceptions that might remain in the minds of consumers and in combatting anti-competitive effects of misleading advertising; and,
- 2) It amounts to a powerful deterrent. The very presence of the corrective advertising sanction in the statute books will make advertisers more cautious in the composition of their advertising claims.<sup>329</sup>

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(327) Supra, at 288-290.

(328) See s 19(3).

(329) For a criticism of the corrective advertising remedy, see Dyer and Kuchl, 'The Corrective Advertising Remedy of the FTC', (1974)1 Journal of Marketing 48. Generally see Cornfeld, 'A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission' (1976)61 Iowa Law Review 693.



(4) CONSOLIDATION

Laux<sup>330</sup> in discussing government regulation of advertising in Canada states that

"the scattering of legislation...in a broad variety of enactments which are primarily directed at matters other than advertising and for which the advertising provisions are merely incidental suggests that the enforcement will be equally scattered and somewhat piecemeal".

The Report of the Ministerial Working Party reviewing certain consumer and commercial legislation in New Zealand, entitled *Proposals for a Selling Practices Act*, is also critical of the high level of fragmentation of consumer legislation in this country, and the Working Party recommend that consumer legislation be consolidated so as to make it more intelligible and accessible to the consumer and trader alike.<sup>331</sup>

What then is the case for consolidation? First, it is undoubtedly true that the distribution of advertising provisions in a large number of Acts renders them less accessible than would be the case, for example, if they were all embraced in an advertising code.

Second, these provisions are administered by a number of different departments<sup>332</sup> which means that no

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(330) "Deceptive Advertising, the Law and the Canadian Consumer", in Studies in Canadian Business Law (1971), ed. by Fridman, 218-219.

(331) Proposals for a Selling Practices Act, 8 July 1980, page 7.

(332) For example: the Food Act 1981 and the Medicines Act 1981 (Department of Health); the Animal Remedies Act 1967 and Pesticides Act 1979 (Dept. of Agriculture and Fisheries); the Consumer Information Act 1969 and the Merchandise Marks Act 1954 (Dept. of Trade and Industry); Credit Contracts Act 1981 (Dept. of Justice).

cohesive policy regarding enforcement can be pursued. Furthermore, the Department of Trade and Industry does not have the time nor the resources to implement adequately the provisions of the Consumer Information Act 1969.

Third, the penalties *vis-a-vis* non-compliance vary greatly and this demonstrates the need for rationalisation. For example, a person who knowingly contravenes a provision of the Consumer Information Act 1969 is liable to a fine of up to \$500,<sup>333</sup> whereas a person who similarly contravenes a provision of the Food Act 1981 when advertising a food faces a fine of \$3000 or a term of imprisonment of 3 months.<sup>334</sup>

However, while there is a need for rationalisation it is also clear that consolidation only works up to a point. Some statutes regulate activities in very specialised areas and it is appropriate that the government department employing persons with expertise in those areas should have responsibility for the administration of statutes falling within their field of competence. Therefore it is suggested that the Department of Agriculture and Fisheries is the appropriate department to oversee the Animal Remedies Act 1967 and the Pesticides Act 1979 and the incorporation of the advertising provisions

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(333) S 18(2).

(334) S 11(3).

of these enactments in an Advertising Code is likely to derogate from, rather than improve upon, the *status quo*. The same could be said for the Food Act 1981 and the Medicines Act 1981 - the Health Department is best placed to oversee regulation in this area.

There is room though, as the Working Party suggests,<sup>334A</sup> for the consolidation of the Consumer Information Act 1969, the Merchandise Marks Act 1954 and the Wool Labelling Act 1949<sup>335</sup> into a single Trade Descriptions Act.<sup>336</sup> To this, I would add that certain provisions of the Weights and Measures Act 1925 relating to the display of net weight and measures of any goods, be incorporated.<sup>337</sup> Although the Consumer Information Act 1969 supplements and in some respects duplicates the existing provisions of the Weights and Measures Act 1925 and the Merchandise Marks Act 1954 no reference is made in the Act to either of these earlier statutes. The Working Party recommend that this consolidating legislation be along the lines of the Trade Descriptions Act 1968 (UK) and there would be much to commend such an approach in that one Act would cover labelling, marking, and trade descriptions involved in all transactions.

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(334A) Proposals for a Selling Practices Act, 8 July 1980.

(335) This Act will be considered below in Chapter V, Disclosure of Information, infra.

(336) Proposals for a Selling Practices Act, op.cit., p. 7.

(337) For a discussion of this Act, see Chapter V, Disclosure of Information, infra.

(338) See Consumer Protection: Final Report, HMSO, 1962 (Cmnd 1781) [Chairman of the Committee: J.T. Molony], para 586, and Part V of the Report for a criticism of the United Kingdom Merchandise Marks Acts 1887-1953. These Acts were repealed by the Trade Descriptions Act 1968.

However, this writer is very sceptical of the emphasis that the Working Party suggests should be placed on self regulation in the implementation of this legislation<sup>339</sup> and would further submit that such consolidation is only a partial solution. Far more important than any consolidation is the establishment of a Consumer Affairs Department with overall responsibility for the regulation and implementation of consumer protection legislation. No matter how fragmented consumer protection laws may be, provided a well trained and motivated Department with adequate resources exists these laws will be enforced and will not be abrogated by disuse.

(5) UNFAIR ADVERTISING

"It has been recognised that most advertisements operate on two levels. They have an informative content which brings to the attention of the potential buyer the type of commodity or service for sale, its quality, serviceability, usefulness and price. There is, in addition, a persuasive element in the advertising message which is directed to the transformation of latent wants on the part of an individual into effective demand for a good or service and which encourages a decision to purchase".<sup>340</sup>

Clearly the statutes that have been considered above outlaw advertising claims that are misleading and/or deceptive, and these legal controls extend to advertisements that in

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(339) For reasons elaborated upon in Chapter II, Business Self Regulation, supra.

(340) Duggan, 'Fairness in Advertising: In Pursuit of the Hidden Persuaders', (1978)11 Melbourne University Law Review 50.

their endeavours to persuade, in fact, deceive. What, however, of advertisements that are neither misleading nor deceptive but may be categorized as unfair?

There is no recognised all-embracing definition of "unfair advertising" but the United States Supreme Court, in the leading case of *FTC v Sperry & Hutchinson Co.*,<sup>341</sup> cited with the approval the criteria developed by the Federal Trade Commission to proscribe business and advertising practices which, although not "false or deceptive", were "unfair". These criteria are:

- "(1) whether the practice, without necessarily having been previously considered unlawful ...is within at least the penumbra of some common-law, statutory, or other established concept of fairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)".<sup>342</sup>

In particular the following advertising technique could be categorised as "unfair"; that is, psychological advertising which seeks 'to condition consumers at an unconscious level to associate brands and products with the satisfaction of unrelated human longings and desires'.<sup>343</sup> Illustrations

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(341) 405 US 233 (1972).

(342) Ibid, 244.

(343) Reed, 'The Psychological Impact of TV Advertising and the need for FTC regulation', (1975) 13 ABLJ 171, 183; Duggan, op. cit., 64 equates psychological advertising with persuasive image appeals which induce purchase by appealing to the consumer's 'susceptibilities and subconscious drives'; Isaacs, 'Psychological Advertising: A New Area in FTC Regulation', (1977) Wisconsin Law Review 1097, 1098 defines it thus: '(A)dvertisements which are meant to affect the subconscious needs and desires of the (consumers)'.

abound of such advertising and the following examples will serve to highlight the issues.

i) The "Pluravit" advertisement. The television advertisement for this product carries the slogan "Tired, listless, lacking energy? You need Pluravit" and it pictures an overworked businessman and uninspiring father who is transformed by the consumption of the manufacturer's product. The unconditioned stimulus (fear appeal) evokes the response (anxiety, insecurity over being a better employee and family man). The unconditioned stimulus is paired with the conditioned stimulus (Pluravit) and also evokes the response (anxiety/insecurity).<sup>344</sup> After repeated trials (showing of the Pluravit advertisement) the patience of the advertiser is rewarded when the father goes to the pharmacist, sees Pluravit and decides to buy it in preference to other brands of vitamin supplement. Consciously, it is unlikely that he considers he will be a better father because of more vitamins, and, rationally, he would reply to an inquisitive bystander that one vitamin supplement is much the same as any other. Unconsciously, however, the presentation of the conditioned stimulus

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(344) The terminology employed is that used in any Psychology textbook. Pavlov's classical conditioning experiments by which he conditioned his dog to salivate upon the sounding of a buzzer are well known. By presentation of the food (unconditioned stimulus) to the dog he caused the dog to salivate (response). Then by associating the presentation of food (unconditioned stimulus) with the sound of the buzzer (conditioned stimulus) he again elicited salivation (response). After numerous repetitions of this pairing process, Pavlov discovered he could elicit salivation (response) by the presentation of the buzzer (conditioned stimulus) alone.

elicits a response which changes his perception of Pluravit subtly, though sufficiently, to influence his choice of vitamin tablets.

ii) An Auckland University Management Paper<sup>345</sup> reports that a practical experiment was conducted in six supermarkets in suburban Auckland. In-store promotions featured "fat-free" Anchor milk powder using different levels of "fear arousal" in advertisements selling the product. The fear utilised was the fear of being overweight. Results indicated that fear arousal increased sales of the product, with the low fear poster being more effective than the high fear depiction.<sup>346</sup> Such market findings, namely, that a mild fear of being overweight induces purchases of non-fat products, uncover the subconscious make-up of the consumer and the appropriate image to be associated with the product.

As Reed<sup>347</sup> contends

"the persuasion or influence deriving from a great deal of TV advertising is arguably due to the largely unconscious, subliminal effects resulting from the classical conditioning practice of pairing the advertiser's product with the dramatized and fictional satisfaction of human needs for love, sex, approval etc.".

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- (345) Fear in the Market Place: A Study of anxiety arousal in persuasive communication (1979) , Working Paper (No.2), Department of Management Studies, University of Auckland.
- (346) The low fear poster depicts a "jovial" fat man consuming cake and surrounded by a table loaded with high calorie foodstuffs. The poster bears the message "Don't you Join The Overweight Club". The high fear poster depicts an enormously fat woman carrying a loaded shopping bag; her face is blanked out and the message reads "Don't put your face in this picture!"
- (347) Id. cit. at 180. See also, Vaughn, 'How Advertising Works: A Planning Model', (1980) 20 Journal of Advertising Resources 27, 28.

iii) Another illustration of overt psychological advertising would be the recent Lion Brewery advertising campaign for "10 Beer". Pictorially, a nubile blond female drools semi-naked over a young rugby-jerseyed male. The female model holds the advertiser's product and the accompanying slogan reads: "I just scored a '10!'" The association of beer with sexual performance and sporting prowess is inescapable.

iv) More insidious is covert psychological advertising or "subliminal advertising"; that is, "advertising in the cinema, etc., directed to the subconscious, shown too rapidly, and briefly to make a conscious impression".<sup>348</sup> This type of advertising first came to the public's attention in 1957 following a well publicized experiment conducted in New Jersey in the United States; that is, the so-called Vicary experiment.<sup>349</sup> The messages "Drink Coca-Cola" and "Hungry? Eat Popcorn" were flashed on the movie screen for 1/3000th of a second every five seconds during a Kim Novak film called "Picnic". During six weeks of testing, involving 45,669 patrons, lobby sales of

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(348) This definition is from *Chambers Twentieth Century Dictionary* (1977); see also Key, Media Sexploitation (1976) 2, 7.

(349) See Westin, Privacy and Freedom (1967); see Chapter II, "Tampering with the Unconscious", where the famous Vicary experiment is discussed.



popcorn increased 57% and sales of coca-cola went up 18%. Such subliminal advertising is not confined to the cinema or television screen, but extends to radio advertisements<sup>350</sup> and printed advertisements.<sup>351</sup>

The above examples serve to illustrate the nature of psychological advertising techniques, both overt and covert,<sup>352</sup> but the question that arises is whether such advertising techniques need to be curtailed? For one thing, are they effective?

There is little doubt that overt psychological advertising techniques are successful in promoting the sales of goods and services. While it is conceded that expensive consumer items such as motor vehicles and television sets may be beyond the scope of overt psychological conditioning,<sup>353</sup> it is widely accepted that purchases of routine products such as food, beverages and other household items may be influenced to a significant degree.<sup>354</sup> One American writer<sup>355</sup> asserts that, in

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(350) Subliminals over the radio involves sub-audial or whispered words; that is, broadcast so faintly in volume so as not to be consciously heard. See Key, op. cit., 108.

(351) A technique of "embedding", whereby emotionally loaded words or pictures are inserted into the background of advertisements, is employed. See Key, The Clam-Plate Orgy (1980), 99.

(352) Overt psychological advertising falls into the *genus* of consciously perceived persuasion, whereas persuasion which the consumer does not consciously perceive may be termed covert psychological advertising.

(353) Reed, loc. cit., 174; Vaughn, loc. cit. 28; Foxall, Consumer Behaviour: A Practical Guide (1980), 193.

(354) Idem.

(355) Kozyris, 'Advertising Intrusion: Assault on the Senses, Trespass On the Mind - A Remedy Through Separation', (1975) 36 Ohio State Law Journal 299, 323.

particular, television viewers are a captive audience and the consumer would require 'the talent of Houdini coupled with the patience of Job' to escape the persuasive effects of much psychological advertising.<sup>356</sup> Even if a consumer possesses the requisite attributes to escape, it is argued that the advertiser may bypass parents' intellectual defences to the commercials themselves by directing advertisements at children, 'thereby creating "miniature screaming salesmen, parroting television commercials"'.<sup>357</sup> The case for subliminal advertising is less convincing. Subsequent field studies have failed to replicate the Vicary experiment outlined above<sup>358</sup> and Dixon<sup>359</sup> comments as follows:

"To allay the anxiety of those who fear commercial exploitation of subliminal perception, there is little evidence to suggest and strong arguments against the possibility of seriously manipulating drives or drive oriented behaviour by subliminal stimulation."<sup>360</sup>

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(356) Cf: Bauer, 'Limits of Persuasion', (1958) 36 Harvard Business Review 105, 110.

(357) Note, 'Can't get Enough of That Sugar Crisp: The First Amendment Right to Advertise to Children' (1979) 54 New York University Law Review 561, 582.

(358) See, for example, De Fleur and Petranoff, 'A televised test of subliminal persuasion', (1959) 23 Public Opinion Quarterly 168; McConnell, Cutler and McNeill, 'Subliminal Stimulation: An Overview', (1958) 13 American Psychiatrist 229.

(359) Subliminal Perception: The Nature of a Controversy (1980), 178.

(360) See also: Subliminal Communication, Institute of Practitioners in Advertising (London, 1958), at 5; Oshikawa, 'Learning and Behaviour without Awareness: Their Implications to Consumer behaviour and Sovereignty', (1970) 12 California Management Review 61, 68; McConnell, Cutler and McNeill, loc. cit., 235.

Nevertheless, such advertising is used extensively<sup>361</sup> and the results of research into subliminal techniques are not conclusive.<sup>362</sup> Given that overt psychological advertising is effective, and that subliminal advertising may be effective, controls over such advertising would not amount to "hollow thunder". In this writer's view control is desirable as psychological manipulation is no less obnoxious than the more obvious misleading claims as to the nature, quality, quantity and price of any goods and services. Furthermore, as discussed in the introductory chapter, where a purchasing decision is irrational there is a risk that a misallocation of resources will result and in the stead of true competition is substituted competition in advertising.

What then is the current position in New Zealand? The statutes that have been considered all have as their primary objective the control of misleading and/or deceptive advertisements and this approach is ill-suited to the regulation of psychological appeals. Regulation of deception confines itself to the intrinsic and material

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(361) See, for example; Key, Media Sexploitation, *supra*, at 108. A New Zealand illustration is the Lion Breweries '10 Beer' advertisement previously mentioned. Overtly, the advertisement is sexist, and covertly, the letters S, E, X, are skilfully embedded in the woman's legs, the glass of beer and elsewhere. See 'Canta' 2, Vol. 52, 9 March 1982, at page 2.

(362) See, for example; Key, *ibid*; Silverman, 'Psychoanalytic Theory', (1976) 31 *American Psychiatrist* 621; Hawkins, 'The Effects of Subliminal Stimulation on Drive Level and Brand Preference' (1970) 7 *Journal of Marketing Research* 323.

characteristics of the good or service, and the main enquiry relates to whether the claim is true or false. This works reasonably well when applied to factual elements such as price, quality, quantity and so on, but when applied to image appeals it becomes 'not only unworkable but irrelevant'.<sup>363</sup> As Barnes and Blakeney<sup>364</sup> observe

"Advertising which appeals to emotional or psychological needs, affects consumers' perceptions of the advertised product rather than their beliefs about them. The factual enquiry relevant in a consideration of deceptiveness is not appropriate to assess appeals to (a consumer's) need for approval, love or happiness".

Moreover, the conspicuous failure of legislation such as the Consumer Information Act 1969, to counter effectively deceptive advertising claims relating to the intrinsic properties of goods and services, renders the prospect of successful control of non-tangible claims occasioned by image advertising, through the devices of such legislation, most unlikely. However, this is not to suggest that no controls exist. Consider the following:

(a) The Broadcasting Rules

The Broadcasting Corporation in New Zealand is a statutory corporation charged, *inter alia*, with the

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(363) Duggan, op. cit., 54.

(364) 'The Regulation of Children's TV Advertising - The Australian Experience', (1980) 1 Journal of Media Law and Practice 265, 273.

responsibilities for maintaining, in its programmes and their presentation, standards which will be generally acceptable in the community.<sup>365</sup> In particular, regard must be had to 'the observance of standards of good taste and decency',<sup>366</sup> and statutory standards outlined in the Broadcasting Act 1976 are supplemented by programme rules prepared and promulgated by the Broadcasting Rules Committee of the Corporation.<sup>367</sup> Both the Corporation and private radio stations must comply with these programme rules<sup>368</sup> and provision is made in these rules for the control of psychological and unfair advertising. For example, the following rules have been promulgated:

- i) Advertisements must observe high standards of ethics, propriety and good taste; they must not be likely to damage the physical, mental or moral welfare of the audience.<sup>369</sup>

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(365) Broadcasting Act 1976, s 24.

(366) Ibid, s 24(1)(c).

(367) This Standing Committee was established pursuant to section 26 of the Broadcasting Act 1976; See the Broadcasting Regulations 1977.

(368) Broadcasting Act 1976, ss 25, 91. Separate rules have been promulgated for television and radio; namely, the Television Standards and Rules (August 1978) and the Radio Standards and Rules (May 1978).

(369) Television Standards and Rules, Rule 1.3; Radio Standards and Rules, Rule 1.3.

ii) No television or radio advertisement shall employ subliminal methods of presentation.<sup>370</sup>

iii) Children should not be urged in advertisements to ask their parents to buy particular products for them,<sup>371</sup> nor should advertisements be framed in such a way as to take advantage of the natural credulity of children.<sup>372</sup>

Under the Broadcasting Act 1976 complaints alleging a breach of any of the statutory standards<sup>373</sup> or the programme rules<sup>374</sup> had to be lodged with the Broadcasting Corporation or with the Committee of Private Broadcasters in the case of a private station.<sup>375</sup> The Corporation or Committee were under an obligation to investigate any such complaint and if the complaint was found to be justified then "appropriate action" had to be taken.<sup>376</sup> If the complainant was dissatisfied with the decision or action

(370) Television Standards and Rules, Rule 1.4; Radio Standards and Rules, Rule 1.4.

(371) Television Standards and Rules, Rule 2(2)b; Radio Standards and Rules, Rule 2(2)(b).

(372) Television Standards and Rules, Rule 2(2)a; Radio Standards and Rules, Rule 2(2) a.

(373) As enumerated in section 24(1).

(374) Such as those outlined above.

(375) Broadcasting Act 1976, ss 25, 91.

(376) Idem.

taken by the Corporation or Committee, or if the relevant body failed to notify the complainant within 14 days after receiving the complaint of the date on which the complaint was to be considered, the complainant could refer the complaint to the Broadcasting Tribunal.<sup>377</sup> This Tribunal, comprising three members appointed by the Governor General on the recommendation of the Minister of Broadcasting,<sup>378</sup> has been fairly active and has considered a number of complaints relating to advertising.<sup>379</sup> This complaints procedure has been outlined to place the matter in historical perspective, for the Broadcasting Amendment Act 1982 has implemented some changes in this area.<sup>380</sup> Under this Amendment Act, formal complaints are to be referred in the first instance to the Broadcasting Corporation or the appropriate private broadcasting station which is under an obligation to investigate any such complaint<sup>381</sup> - the Committee of Private Broadcasters is

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(377) Ibid, ss 25(5), 91(5).

(378) Ibid, s 61.

(379) For example, Broadcasting Tribunal Decisions: No. 10/80 (exaggerated claim made for a brand of anti-dandruff shampoo); No. 11/81 (alleged breach of Rule 2.2(b) relating to children being urged in Broadlands Finance advertisements to ask their parents to purchase products for them); No. 12/81 (complaint arising from a promotion "Tuckers Turf Analysis" conducted by Radio Pacific Ltd); No. 14/81 (breaches by Lion Breweries Ltd in respect of liquor advertising). Numerous other complaints have been lodged by C.R. Turner of Hamilton primarily in respect of liquor advertisements; for example Broadcasting Tribunal Decisions Nos. 2/77, 2/80, 3/80, 9/80, 6/81, 7/81 and 13/81.

(380) This Act came into force on 1 November 1982.

(381) Broadcasting Act 1976, ss 95B and s 95C; new provisions inserted in the principal Act by the Broadcasting Amendment Act 1982, s 11.

abolished<sup>382</sup> - and it is envisaged that most complaints should be capable of resolution "by proper consideration and proper response on the part of the holder of the warrant or authorisation issued in respect of the broadcasting station".<sup>383</sup> If the complaint is found to be justified, in whole or in part, the Broadcasting Corporation or private broadcasting station must, as under the original provisions of the Broadcasting Act 1976<sup>384</sup> take "appropriate action" and advise the complainant of this action.<sup>385</sup> If the complainant is dissatisfied with the decision or the action taken, or if the complainant is not notified within 15 working days after delivery of the complaint advised of the date on which the complaint is to be considered, the complainant may refer the complaint to the Broadcasting Tribunal.<sup>386</sup> A new body, known as the Broadcasting Complaints Committee comprising one person appointed by the Governor General on the recommendation of the Minister of Broadcasting, is established.<sup>387</sup> This Committee is empowered to investigate

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(382) Broadcasting Amendment Act 1982, s 12.

(383) Broadcasting Act 1976, s 95A(h)

(384) Namely, sections 25 and 91, which are repeated by the Broadcasting Amendment Act 1982, s 13.

(385) Broadcasting Act 1976, s 95D.

(386) Ibid, s 95E; the composition of this Tribunal remains unchanged, but the principal Act is amended by repealing section 67 and by substituting a new section 67 relating to the powers and functions of the Tribunal.

(387) Broadcasting Act 1976, s 95F; as inserted in the principal Act by the Broadcasting Amendment Act 1982, s 11.



complaints made against broadcasting stations,<sup>388</sup> and has limited authority to consider formal complaints.<sup>389</sup> It is duty bound to comply with directions given to it by the Tribunal and is under an obligation to report to the Tribunal.<sup>390</sup>

Against this background, it must be asked: 'How effective are these rules and channels of complaint in countering psychological and unfair advertising abuses?'

*First*, it must be recognised that considerable sanctions may be imposed on a station that fails to comply with the rules and this must constitute a considerable deterrent. For example, if the Tribunal forms the view that a station is being operated contrary to the programme rules it may give the station directions in writing to ensure that the rules are complied with.<sup>391</sup> Following a number of complaints against the Broadcasting Corporation relating to the advertising of Lion Breweries' liquor advertisements the Tribunal issued a detailed direction to the Broadcasting Corporation to terminate

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(388) Ibid, s 95 O(1) (a).

(389) That is, it may consider complaints of unjust and unfair treatment in programmes broadcast by any station or unwarranted infringement of privacy in connection with the obtaining of material included in any programmes. See 2 95 O(1) (b).

(390) SS 95 O(1) (c), 67(7).

(391) S 83(1).

its publication of these advertisements.<sup>392</sup> The Tribunal commented further in their decision that a 'failure to comply with the directions or the broadcasting of any matter contrary to the directions is deemed to be a breach of the conditions of the relevant warrant'.<sup>393</sup> The consequence of non-compliance in these circumstances may be drastic indeed; only a company or body incorporated in New Zealand may operate a broadcasting station, and may only do so if it has been granted a warrant by the Broadcasting Tribunal.<sup>394</sup> Warrants for broadcasting stations are normally issued subject to certain conditions, such as the necessity to comply with the programme rules, and if the holder of a warrant fails to comply with directions from the Tribunal it is deemed to have committed a breach of the conditions of its warrant.<sup>395</sup> A station which has breached, or is deemed to have breached the conditions of its warrant, may be subjected to sanction at the hands of the Tribunal. The Tribunal may refuse to renew its warrant, or renew it for a lesser term than the normal 5 years.<sup>396</sup> Alternatively, the Tribunal may suspend or revoke the warrant for such period as it thinks fit, or

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(392) See Broadcasting Tribunal decision no. 14/81, dated 17 June 1981. Basically, the rules relating to sale of alcohol limit advertising to disclosure of information relating to details of points of sale and the service and the description of the general range of merchandise (eg. NZ and overseas wines); advertisements must not use brand names nor extoll the qualities of any liquor etc. See Television Standards and Rules, Rule 1.11.

(393) Ibid, at page 2.

(394) See the Broadcasting Act 1976, ss 70, 76.

(395) Broadcasting Act 1976, ss 83, 95U.

(396) Ibid, s 81(2), (3).

reduce the term of the warrant, or impose on the holder a substantial fine.<sup>397</sup> Furthermore the Tribunal may order in any proceedings that a broadcasting station, for example, pay the costs of the complainant.<sup>398</sup>

*Second*, strict interpretation of the rules may reduce their impact. For example, consider the Monitor Incorporated complaint about a Broadlands Finance advertisement.<sup>399</sup> The advertisement showed a girl colouring in on the lounge floor who asks her father a series of questions; for example, "Daddy - one day can we have a swimming pool?", "Dad - will I be able to have a bedroom to myself?", etc. Monitor alleged that the advertisement was in breach of Rule 2.2(b):

"Children should not be urged in advertisements to ask their parents to buy particular products for them".

The Tribunal dismissed the complaint since the advertisement had not directly urged the child to ask her parent to buy the particular products. If the result had merely been that some children might ask their parents, this would be insufficient. To succeed the complainant would need to 'have the rule changed to provide a stricter standard'.<sup>400</sup>

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(397) Ibid, s 81(4).

(398) Ibid, s 67C.

(399) See Broadcasting Tribunal decision no. 11/81, dated 9 June 1981.

(400) Ibid, at page 3.

This narrow approach, if consistently followed, would reduce substantially the efficacy of the Rules for, unless they are given a liberal construction, they become ill-suited to regulate psychological persuasion.

*Third*, the Rules may be criticised as being too vague; for example, the requirement that "advertisements observe high standards of ethics, propriety and good taste"<sup>401</sup> is very difficult to apply. Potential exists for greater elaboration in the form of more detailed guidelines. For example, the Credit Contracts Act 1981 provides guidelines for the re-opening of credit contracts<sup>402</sup> that facilitate the determination of the question as to whether a credit contract is oppressive or not.

Overall, however, this writer is of the opinion that adequate rules have been promulgated pursuant to the Broadcasting Act 1976 for the control of psychological and unfair advertising, that abundant sanctions exist to promote compliance, and, subject to a more liberal interpretation of the rules being pursued, that there is little need for concern in this area.

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(401) Television Standards and Rules, Rule 1.3;  
Radio Stations and Rules, Rule 1.3.

(402) See s 11.

(b) Print Media Rules

Unlike the position *vis-a-vis* broadcasting, control in the print media of psychological and unfair advertising practices is contingent upon compliance with the codes of advertising practice as promulgated by the Committee of Advertising Practice.<sup>403</sup> The Committee of Advertising Practice states that one of its main objectives is as follows:

"To seek to maintain at all times and in all media a proper and generally-acceptable standard of advertising and to ensure that advertising is not misleading, either by statement or by implication".<sup>404</sup>

Specific codes have been drafted in an endeavour to meet this objective and the following illustrations taken from the codes serve to demonstrate the Committee's concern for psychological advertising and unfair advertising practices; namely

i) Advertisements for cigarettes must not 'depict anyone smoking who is participating (or has just participated) in an event that requires physical activity, stamina or athletic conditioning to a standard beyond that of normal recreation'; nor must such advertisements imply that cigarette smoking is helpful to romance, success, personal advancement, public prominence or that it promotes sexual attractiveness.<sup>405</sup>

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(403) See Chapter II, Business Self-Regulation, supra.

(404) See Codes of Practice, issued by the Committee of Advertising Practice, at page 1.

(405) Ibid; Code for the Marketing of Cigarettes, paragraph 4.

ii) The Code for Liquor Advertising proscribes advertisements that suggest that liquor is 'a necessary element of success in life, or an essential part of the pleasure and excitement of living'; nor should liquor advertisements suggest a relationship between liquor and sex which is capable of being regarded as offensive.<sup>406</sup>

iii) In accordance with the general principle of good taste, people should not normally appear to be basically unpleasant, neurotic etc. unless these characteristics are the basic reason for the existence of the product or service, and advertisements should avoid the promise of unrealistic psychological reward as a result of the use of the product or service.<sup>407</sup>

There is no specific enjoinder of subliminal advertising but the Committee of Advertising Practice comment that

"This is a very difficult area to cover in a code of practice and we have sought to regulate the quality, good taste and manipulative potential of advertising by incorporating general passages in the code referring to the use of innuendo and implication in advertisements".<sup>408</sup>

This is difficult to follow as the Broadcasting Rules Committee had no difficulty whatsoever in outlawing subliminal presentation.<sup>409</sup>

(406) Ibid.

(407) Ibid; Code of Practice - People in Advertising, paragraphs 5, 6.

(408) Per Theresa Connolly-Brown, Secretary, Committee of Advertising Practice, letter dated 9 July 1982.

(409) See Television Standards and Rules, Rule 1.4; Radio Standards and Rules, Rule 1.4.

The Press Council<sup>410</sup> claims jurisdiction in respect of complaints relating to advertising where the advertisement concerned was published by a member of the Newspaper Publishers Association.<sup>411</sup> As a matter of practice, however, such complaints are referred to the Newspaper Publishers Association where they are adjudicated upon by an advertising advisory sub-committee of that organisation by reference to the various codes of conduct.<sup>412</sup> Kingsbury<sup>413</sup> contends this practice is less than desirable for

"the reader of a newspaper could reasonably expect that his formal complaint about an advertisement would be the subject of an adjudication by the Press Council rather than a group composed solely of newspaper interests..."

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- (410) The Press Council is a voluntary organisation sponsored by the Newspaper Publishers Association and the Journalists Association. See Burrows, News Media Law in New Zealand (2 ed, 1980), 418.
- (411) See Kingsbury, 'Complaints Against the Media', (1981) 1 Canterbury Law Review 155, 169. Complaints must, in the first instance, be referred to the editor of the publication, and only if the response is not satisfactory, or if the editor does not respond, may the matter be referred to the Press Council.
- (412) Ibid, 169-170. The results of such adjudication are not always satisfactory. Kingsbury cites a case involving a complaint against a Labour Party advertisement. Although the Advertising Advisory Committee accepted that if the economic figures employed in the advertisement were inaccurate to the extent alleged the advertisement would be deceptive, the Committee merely advised the complainant that the Newspaper Publishers Association intended reviewing the rules on political advertising at its next annual conference. See (1975) 3 NZPC Rep. 17-18.
- (413) Ibid, 171.

As regards complaints concerning newspapers and magazines published by persons who do not belong to the Newspaper Publishers Association, there is no procedure for the consideration of these complaints. Similarly, no procedure exists for the consideration of complaints in respect of mailbox leaflets etc. The effectiveness of the Committee of Advertising Practice's codes are greatly diminished through the lack of adequate sanctions and less than full subscription to the codes,<sup>414</sup> and it seems strange that broadcasting should be subjected to such potentially rigorous controls while the print media is left largely to its own devices.

Having considered the nature of present controls over unfair advertising in New Zealand (with particular emphasis upon psychological advertising) it is proposed now to canvass briefly the approaches adopted in some other jurisdictions. As mentioned earlier,<sup>415</sup> the Federal Trade Commission is the primary government regulator of advertising in the United States and it derives its authority, in part, from section 5 of the Federal Trade Commission Act,<sup>416</sup> which stipulates, *inter alia*, that:

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(414) See Chapter II, Business Self Regulations, supra.

(415) Supra, at 314.

(416) 15 USC 45(1970), as amended by 15 USC 45 (Supp. IV, 1974).



"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful".

Under this broad mandate the Federal Trade Commission has exercised its power to proscribe untruthful and misleading advertising on innumerable occasions.<sup>417</sup> The Commission has been permitted to categorise such advertising as misleading in the absence of actual deception being shown as the relevant enquiry is whether the advertisement is likely to deceive,<sup>418</sup> and, further, it is not necessary for the Federal Trade Commission to demonstrate that the advertisement is likely to deceive a majority of consumers or even the average consumer<sup>419</sup> as it is sufficient if 'an appreciable or measurable segment of the public' could be misled.<sup>420</sup> Pursuant to the mandate under section 5, the Federal Trade Commission has also sought to outlaw advertisements that are "unfair", although neither untruthful nor deceptive. The Commission has issued a "cigarette rule" that stipulated that cigarette packaging and advertisements should carry warnings of the hazards associated with smoking.<sup>421</sup> This rule was justified by

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(417) For example, see *FTC v Winstead Hosiery Co.* 258 US 483 (1922); *Gimbel Bros Inc v FTC* 116 F 2d 578 (1941); *Pep-Boys Manny, Moe & Jack Inc v FTC* 122 F 2d 158 (1949); *Double Eagle Lubricants Inc v FTC* 360 F 2d 258 (1966); *Charles of Ritz Distributors Corp. v FTC* 143 F 2d 676 (1944).

(418) *Idem.*

(419) *Idem.*

(420) *Feil v FTC* 285 F 2d 879, 892 (1960).

(421) FTC Trade Regulations Rules, 29 Fed. Reg. 8324 9324-75 (1964). This rule was rendered superfluous by the enactment of the Federal Cigarette Labeling and Advertising Act 1965.

the Commission on the basis that 'a method of selling violates section 5 if it is exploitative or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others'.<sup>422</sup> More recently, the Federal Trade Commission published proposed rules designed to restrict commercial television advertising directed at children.<sup>423</sup> The Federal Trade Commission has proposed to

- "(a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising.
- (b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which product poses the most serious dental risks.
- (c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers."

In justifying these proposals the Federal Trade Commission asserted that television advertising directed at children under eight exploits a naive audience and that sugared products pose a significant health risk to children.<sup>424</sup> A recent survey in Sydney would endorse

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(422) Ibid, at 8355.

(423) Children's Advertising Proposals, 43 Fed. Reg. 17967 (1978).

(424) See Note, 'Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children', (1979) 54 New York University Law Review 561, 563.

these assertions.<sup>425</sup> Considerable doubts exist about the constitutionality of the above Federal Trade Commission proposals,<sup>426</sup> but the proposals do demonstrate the usefulness of an unfairness doctrine. As one American writer notes:

"Both Congress and the [Supreme] court have stressed...that unfairness is a flexible concept, and that the FTC may serve 'like a court of equity' in weighing business practices against the public interest".<sup>427</sup>

In the United Kingdom, the concept of "fairness" is embodied in the Fair Trading Act 1973. If a 'consumer trade practice',<sup>428</sup> has the effect of misleading or confusing consumers or of subjecting consumers to undue pressure to enter into consumer transactions,<sup>429</sup> the Secretary of State for Prices and Consumer Protection, or any other Minister, or the Director General of Fair Trading may refer to the Consumer Protection Advisory

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(425) A survey conducted by the Australian Broadcasting Tribunal revealed that television advertising of confectionery and fast foods is effective on children who are heavy TV viewers. The remedy, it said, would be to require television advertisements to transmit information designed to give children a clearer idea of what was nutritionally valuable. See "The Press", 9 July, 1982.

(426) Supra, note 420; that is, would such a rule infringe the constitutional right of free speech.

(427) Supra, note 420; at 591.

(428) 'Consumer trade practice' is defined in section 13 as any practice carried on in relation to the supply of goods or services to consumers and must relate to, *inter alia*, the promotion (by advertising, labelling or marketing of goods, canvassing or otherwise) of such goods or services.

(429) See s 17(2); the examples given are not comprehensive.

Committee<sup>430</sup> the question whether the particular practice adversely affects the economic interests of consumers in the United Kingdom.<sup>431</sup> If the answer to this reference is in the affirmative then the practice, while remaining entirely lawful and permissible, is tainted with disrepute.<sup>432</sup> However, if the reference to the Committee was made by the Director General of Fair Trading, and this reference was accompanied by proposals for proscribing the practice, the Secretary of State may make an order giving effect to the proposals.<sup>433</sup> These powers have been exercised in respect of advertising. For example, the Business Advertisements (Disclosure) Order 1977<sup>434</sup> provides that a person seeking to sell goods in the course of a business must not publish any advertisement indicating that goods are for sale unless it is reasonably clear that the goods are to be sold in the course of a business. As the buyers rights of redress, for example, will depend to some extent upon the status of the person selling the goods, the consumer may be misled as to his rights in the absence of such an indication.<sup>435</sup>

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(430) An independent body created by the Fair Trading Act 1973, s 3.

(431) S 14.

(432) See Mickelburgh, Consumer Protection (1979), 279.

(433) S 22; such an order may only be made if the report of the Advisory Committee states that it agrees with the Director General's proposals.

(434) S.I. No. 1918.

(435) For example, the Sale of Goods Act 1908 (NZ) implies terms as to fitness for purpose and merchantable quality into contracts for the sale of goods where the vendor is a dealer in such goods; see section 16. Other orders pursuant to the Fair Trading Act 1973 in relation to advertising are: the Mail Order Transactions (Information) Order 1976, S.I.No. 1812; Consumer Transactions (Restrictions on Statements) Order 1976, S.I. No. 1813.

Furthermore, Section 34 of the Fair Trading Act 1973 authorises the Director General of Fair Trading to take appropriate action where he uncovers a course of conduct which is unfair and detrimental to consumers. Conduct is "unfair" where it consists of breaches of the criminal or civil law, whether or not there has been a conviction or whether or not civil proceedings have been brought.<sup>436</sup> The Director General must first endeavour to obtain a satisfactory written assurance from the offender that such conduct will cease, but if no such assurance is forthcoming or if such an assurance is broken, the Director General may bring proceedings before the Restrictive Practices Court.<sup>437</sup> This court is empowered to make an order prohibiting the particular conduct or may itself obtain an assurance - failure to comply with such an order or assurance constitutes an imprisonable offence for contempt of court.<sup>438</sup> Pursuant to these provisions a 'cease and desist' order has been obtained against a chain of London restaurants for constant breaches of food hygiene regulations<sup>439</sup> and there is obviously scope

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(436) S 34(2).

(437) S 35; Such proceedings may be commenced in the county court in particular circumstances; see section 41.

(438) S 37.

(439) See Cranston, *op. cit.*, 261; this writer comments further that 'the power should be used more widely' as 'the present levels of fines being imposed by magistrates' courts is quite inadequate to deter some businesses from breaching the Food and Drugs Act 1955 because they can simply treat fine s as a minor business expense'.

to employ these provisions in the regulation of unfair advertising practices.

Division 1 of Part V of the Trade Practices Act 1974 (Cth) of Australia is headed "Unfair Practices" but this is in the nature of a passing reference to the concept of "unfairness" as the term "unfair" is not taken up in the ensuing provisions. Sections 52 and 53, the major provisions dealing with advertising, are confined to the prohibition of conduct and statements which are either false, misleading, or deceptive. Although it has been pointed out<sup>440</sup> that the Acts Interpretation Act 1901-1973 (Cth) deems the heading to be part of the Act, it is most unlikely that any court will extend, on this basis, the ambit of sections 52 and 53 to strike at unfair advertising that lacks any false or deceptive element. To date all cases dealing with sections 52 and 53 have involved factual misstatements.<sup>441</sup>

As against this background the most appropriate form of regulation of unfair advertising practices in New Zealand falls to be considered. The promulgation of a general statutory proscription of all unfair advertising techniques and practices has advantages and disadvantages. As the Australian Trade Practices Review Committee commented<sup>442</sup>

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(440) Goldring and Maher, op. cit., 206.

(441) See text, supra.

(442) See Goldring and Maher, op. cit., 207.

"...a general prohibition of 'unfair' conduct, as contained in the Federal Trade Commission Act, could, under Australian conditions, result in a considerable degree of uncertainty in commercial transactions. Accordingly, we are strongly of the view that a like prohibition should not be incorporated into the Trade Practices Act at this time".

This is undoubtedly a very powerful consideration but it may be observed that some uncertainty is inevitable whenever any new legislation comes into force and the wide discretion arrogated to the New Zealand courts in Acts such as the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979 and the Credit Contracts Act 1981 are hardly conducive to certainty in the field of contract, for example - and yet there is little evidence to suggest that commercial activity has, or will be, unduly affected.

A more compelling argument against the adoption of a general formula such as that outlined in section 5 of the Federal Trade Commission Act is that such a formula is extremely vague and of indeterminate width.<sup>443</sup> Are all image appeals and psychologically oriented advertisements to be categorised as "unfair" merely because they are persuasive and directed at the subconscious? Such an approach, it has been suggested,<sup>444</sup>

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(443) Obviously, the same criticism could be directed at self regulatory codes of conduct.

(444) Reed and Coalson, 'Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: FTC Regulation of Emotionally Conditioning Advertising', 11 Georgia Law Review 733.

"could require all advertisements to become a catalogue of consumer information, its selling purpose completely obscured". Duggan<sup>445</sup> therefore recommends that a line be drawn between image appeals in general, on the one hand, and those which are directed at specific audiences with peculiar susceptibilities which the appeals actively exploit, on the other. Another commentator would permit all psychological appeals save those which 'exploit and cultivate desires that contradict societal principles in law'.<sup>446</sup> This latter suggestion has nothing to commend it as the identification of 'societal principles in law' would seem to be an impossible task, and Duggan<sup>447</sup> readily concedes that there would be considerable difficulty with his approach in distinguishing between exploitative claims and other forms of image appeal. Possibly the best approach would be that adopted in the European Economic Community Draft Directive on Misleading and Unfair Advertising<sup>448</sup> where unfair advertising is defined to mean, *inter alia*, advertising which

"(c) abuses or unjustifiably arouses sentiments of fear; or

(d) abuses the trust, credulity or lack of experience of a consumer or influences or is likely to influence a consumer or the public in general in any other improper manner".

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(445) Op. cit., 70.

(446) Note, 'Fairness and Unfairness in Television Product Advertising' (1978) 76 Michigan Law Review 498, 529.

(447) Op. cit., 70.

(448) This directive issued in July 1979 is set out in Lawson, Advertising and Labelling Laws in the Common Market, (2 ed, 1981).



Such a formula is also open to the charge of vagueness but in an area as mercurial and indeterminate as unfair advertising this is, perhaps, unavoidable. However, to impose criminal sanctions in respect of non-compliance with a general statutory prohibition against 'unfair advertising' would be extremely harsh given the inherent difficulties in determining the ambit of this term.

In conclusion the following observations are made:

i) The Broadcasting Rules Committee have done an admirable job in promulgating codes for television and radio. These codes are sufficiently detailed,<sup>449</sup> thereby minimising the force of a "vagueness" allegation, and adequate sanctions exist for the enforcement of these rules.

ii) The Committee for Advertising Practice similarly have drafted fairly detailed codes of conduct catering for particular types of advertising. In Chapter II it has been suggested that the efficacy of these voluntary codes may be enhanced by the adoption and implementation of certain measures; namely, by the inclusion of a consumer representative or representatives on the Committee, by the monitoring of such codes by a Consumer Affairs Department,<sup>450</sup> and by ensuring that adequate sanctions exist

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(449) That is; specific rules are directed at subliminal advertising, advertisements associated with the sale of alcohol, financial advertising, advertising and children, and political advertising.

(450) This suggestion will be elaborated upon in Chapter VI, Conclusion, infra.

to back up the codes. It is also envisaged that the Consumer Affairs Department be empowered to approve such codes and necessary directions could be given as to the content of such codes. The problems associated with non-membership of an organisation that does subscribe to the codes of practice, or the difficulties arising where certain organisations themselves do not subscribe to the codes, may be dealt with by promulgating a rule making the lawful receipt of advertising revenues contingent upon the affiliation of the newspaper, magazine, direct mail publisher etc. to the Newspaper Publishers Association or some other organisation which subscribes to the codes of practice.<sup>451</sup>

iii) It is recommended that provision be made for a statutory prohibition against unfair advertising. Negative features associated with such legislative control could be obviated by providing: (a) That no prosecution be brought in respect of unfair advertising except with the leave of the Minister of Consumer Protection; where media organisations such as the Broadcasting Tribunal and the Newspaper Publishers Association are implementing their codes of practice, the need for leave to prosecute would not arise. (b) That in any prosecution, the court should be directed to have regard to the codes of practice in the particular medium

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(451) Idem.

in assessing the unfairness or otherwise of the advertising; this would mitigate against "vagueness" deficiencies and promote compliance with the codes of practice in the broadcast and print media.<sup>452</sup>

(6) SUMMARY

a) Consultation with offenders is to be encouraged as a means to settle disputes inexpensively; however, it is submitted that there is no place for *compulsory* consultation provisions in advertising regulation due to (i) the delays involved, and (ii) paradoxically, the inflexibility that this entails.

b) Offences against advertising provisions should be strict liability offences, subject to the proviso that the offender may escape liability by demonstrating (i) that he acted innocently, and (ii) that he took all reasonable steps or precautions to ensure compliance.

c) The informational content of advertisements should be bolstered by mandatory disclosure of price information and the increased dissemination of product quality and performance information.

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(452) Idem.

d) Consideration should be given to:

(i) Advertisement substantiation in that this facilitates detection of deceptive or misleading advertising claims and if advertisers are compelled in advance of publication to prepare material substantiating their claims, this could have a beneficial impact on the reliability of claims; (ii) Corrective advertising, in that this constitutes a powerful deterrent and is a means whereby the residual impact of deceptive or misleading advertisements may be dissipated; (iii) Legislative control of unfair advertising.

e) It is submitted that the Consumer Information Act 1969, the Merchandise Marks Act 1954, the Wool Labelling Act 1949 and labelling provisions of the Weights and Measures Act 1925<sup>453</sup> be consolidated into one statute. This would not only assist consumers but would make the law more intelligible and accessible for manufacturers.

f) Finally, consideration must be given to the establishment of a Department, say a Consumer Affairs Department, with sole responsibility for the administration of consumer protection legislation.<sup>454</sup>

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(453) See, for example, s 18(3) which makes it an offence for any person to sell or offer or expose for sale by retail by weight or by measure any goods enclosed in a package, unless the net weight or measure of the goods is legibly written or printed on the outside of the package or on an attached label.

(454) Discussed in Chapter VI, Conclusion, infra.

## V. DISCLOSURE OF INFORMATION

Before a decision to purchase a product or service is made a consumer usually consults, or is exposed to, several sources of information ranging from advertising to point of sale disclosure by the seller. As stressed in earlier chapters, the importance of the provision of accurate and reasonably detailed information to consumers cannot be overestimated as adequate knowledge by consumers of the full range, quality and price of goods and services sold in the market is a prerequisite for "workable" competition. Without adequate information consumers cannot compare prices and assess the relative quality of competing goods, and consequently are unable to make a rational choice.

Although it is suggested in the preceding chapter that the informational content of advertisements may be improved via the mandatory disclosure of the price of goods and certain services and through increased disclosure of quality and performance criteria, advertising does not lend itself to extensive or even reasonably detailed disclosure; amongst other things, the brevity of advertisements makes it practically impossible to demand that detailed information be incorporated in an advertisement and there is 'a real problem of consumer overload if detailed scientific data is reproduced in

advertisements'.<sup>1</sup> However, considerable scope exists outside the advertising arena whereby information regarding goods and services can be communicated to the consumer. In this chapter it is proposed to consider some of these avenues of disclosure.

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(1) See Blakeney and Barnes, 'Advertising Regulation in Australia - An Evaluation', (1982) 8 Adelaide Law Review 29, 32.

# 1. MANDATORY DISCLOSURE IN CREDIT TRANSACTIONS

## (1) INTRODUCTION

There has been a phenomenal increase in the availability and use of credit by consumers in recent times<sup>2</sup> with a number of factors fuelling a transition from a cash to a credit society. Of primary significance has been the growth of the economy in general, the rising income of the population, the expansion of consumer aspirations and the increasing social acceptability of credit. From the point of view of the manufacturing and retailing sectors the availability of credit means that they are able to sell goods and services to consumers which their current income or wealth would preclude them from purchasing - the net result is that turnover, and hence profitability is increased. The consumer benefits

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- (2) For example, the total amount owing under hire purchase agreements in New Zealand has shown a steady increase over the years as the following figures reveal. Amount as at:

	<u>Total</u> (millions)
31 December 1959	\$ 11.7
31 December 1964	\$ 26.2
31 December 1969	\$ 84.8
31 December 1975	\$220.1
31 March, 1980	\$596

[Source: New Zealand Yearbooks for the relevant years.]

The Finance Houses Association (Inc.) in their Annual Report for the year ending 31 March 1980 reported that total gross loans and advances of members increased 33.4% or \$279.6 million for the year. While this lending was distributed widely throughout all areas of the economy and was not confined to consumers in the narrow sense, it is nevertheless indicative of the type of growth experienced in the credit industry.

in that he can purchase goods and services as opportunity or desire arises with little or no reference to his immediate cash position. Credit serves, therefore, as a mechanism for bridging the gap between the low income years when consumer needs are perhaps at their greatest and the high income years when these needs may have declined. As Katona<sup>3</sup> explains the disjunction between the family life cycle and the income cycle of the average salaried employee is a significant factor in the promotion of instalment credit. This form of credit is used as a device to level the income curve over the occupational career and enables the consumer to meet his consumer wants immediately without having to wait for the higher income years.

Credit may be provided in an infinite variety of ways but as the Contracts and Commercial Law Reform Committee point out<sup>4</sup> credit transactions fall basically into two categories; namely, deferred payment sales and loans. The two major types of deferred payment sales in New Zealand are credit sales and hire purchase agreements of the *Helby v Matthews*<sup>5</sup> variety or *Lee v Butler*<sup>6</sup> variety.

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- (3) G. Katona, The Mass Consumption Society (1964), 232.
  - (4) Credit Contracts Report (February 1977), 1.01. Similarly the Crowther Committee Report on Consumer Credit (1971) 1.1.2, takes credit to mean 'either the deferment of payment for goods delivered or services rendered at once or the straight lending of money'.
  - (5) [1895] AC 471.
  - (6) [1893] 2 QB 318. Hire purchase agreements are most frequently drafted in this form in New Zealand; that is, as conditional purchase or conditional sale agreements. The Chattels Transfer Act 1957, s 57, makes it possible for certain sellers to avoid the operation of the Sale of Goods Act 1908, s 27(2).



The feature that distinguishes hire purchase agreements from credit sale agreements is that while possession of goods subject to a hire purchase agreement is given to the purchaser, property in the goods remains with the vendor until all the instalments have been paid; conversely in a credit sale arrangement property in the goods is transferred to the purchaser at the time of the sale or delivery of the goods and the passing of property is not contingent upon the payment of the full purchase price.<sup>7</sup> The second major category of credit transactions are loans. The primary source of loan monies in New Zealand are the banks and finance houses who provide credit to consumers to facilitate the purchase

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- (7) There is the familiar buying 'on account' where retailers allow credit to certain responsible customers and many retail outlets operate a type of revolving credit - often termed a budget account - whereby the customer agrees to pay so much a month and at the same time can have goods on credit up to a certain value; as the customer's payments reduce his outstanding debt, he can then buy more goods or 'top up' his debt to the arranged maximum amount. As a further alternative most retailers accept payment by a credit card. There are two main types of credit card in New Zealand, namely, three party cards and two party cards. With respect to the former variety the first party is the cardholder, the second party is the outlet that accepts the card, and the third party is the bank or credit card company that issues the card. In this case the credit is not provided by the retailer but by the bank or credit card company operating the scheme. As regards two-party cards, again the cardholder is the first party and the retailer the second party. There is no third party though because the retailer issues its own card. These two party credit cards are often called 'in house' cards and are offered on store charge accounts by most of the big business houses in New Zealand.

of goods and services.<sup>8</sup> Banks, for example, provide credit through loans or the extension of overdraft facilities, the former usually being a loan of a fixed sum at a fixed rate of interest to be paid off by fixed regular instalments, while the latter is an arrangement whereby a customer may borrow on his current account. As the Contracts and Commercial Law Reform Committee emphasise,<sup>9</sup> loans and deferred payment sales serve a similar objective in the usual case; namely, to enable a consumer to purchase certain goods and services.<sup>10</sup> Furthermore, if a person has insufficient cash to acquire a particular chattel, for example, he may enter into a hire purchase agreement or raise a loan from a finance company or bank. Such a lending institution may require the borrower to execute an instrument by way of security over the particular chattel, which has the effect of transferring the property in the chattel to the lender. In effect, therefore, the position of the secured lender is the same as that of the seller under a hire purchase agreement; that is, property in the goods is retained until such time as the amount owing, including interest

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(8) For example, the total gross loans and advances of the Finance Houses Association member companies as at 31 March 1980 was \$1,167 million representing an increase of 33.4% or \$279 million over the previous year. Of this sum \$185 million was lent in order to finance the purchase of vehicles and \$143 million was distributed by way of personal loan. See the New Zealand Finance Houses Association (Inc.) Annual Report and Review of Activities for 1979/80.

(9) Credit Contracts Report, 1.02.

(10) See also the Crowther Committee Report, 1.2.2. and *Campbell Discount Co Ltd v Bridge* [1962] AC 600, 626.

charges, is paid. Another obvious similarity between deferred payment sales and loans is that the purchaser and borrower, respectively, pay a charge for the privilege that is afforded them.

The expansion of the credit industry has brought significant and obvious advantages. In addition to advancing the business of those in industry, commerce and finance, the growth of consumer credit may well have been a factor in raising the standard of living of the average and low income earner.<sup>11</sup> However as Ison comments<sup>12</sup>

"[The growth of credit marketing] has also provided the opportunities and incentives for predatory practices, deceit and other abuses. Complaints have been voluminous about, for example, misleading advertising, fraud, the concealment of credit terms, high pressure tactics, defective goods, dubious accounting methods and oppressive collection tactics. These problems were not created by the expansion of new forms of consumer credit, but they may have been aggravated. For example, it is often thought to be easier for a high-pressure salesman to induce a signature on an instalment contract than to induce a signature on a cheque for the same amount".

Furthermore it is clear that there is a substantial difference between the simplicity evidenced by the 'buy now, pay later', 'easy terms' type of exhortation and the complicated credit contract that the consumer actually signs. It is probably fair comment to assert that the average person who buys goods on credit is usually only interested in the practical aspects of the transaction

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(11) D. Caplovitz, 'Consumer Credit in the Affluent Society' published in Consumer Credit Reform (1970), 9.

(12) Credit Marketing and Consumer Protection (1979), 14.

and is seldom aware of the precise nature of his legal rights and obligations. This may in part be ascribed to the apathy of the buying public, but is also a reproach to the complexity of documents employed in this area, that buyers aware of the futility of trying to comprehend all the complexities, are prepared to blindly sign any form that is placed before them, if by so doing they can obtain possession of the goods on payment of a fraction of the purchase price, or indeed, without paying anything at all.<sup>13</sup> There is also a significant difference in expertise between the credit supplier and the consumer, with the consequence that the 'potentiality for exploitation' is manifest.<sup>14</sup>

Various approaches towards the regulation of the credit market have been adopted in New Zealand. The Moneylenders Act 1901 was the first attempt in this country to control lending transactions. This Act was replaced by the Moneylenders Act 1908 and this in turn was extensively amended by the Moneylenders Amendment Act 1933. The moneylenders legislation had as its primary objective the protection of debtors against unconscionable bargains and sharp practices of moneylenders. To this end the following techniques were adopted: (1) a system of licensing and registration was set up, the idea being that only fit and

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(13) Roebuck, Duncan and Szakats, Law of Commerce (1968), 226.

(14) Collinge, Law of Marketing in Australia and New Zealand (1971), 323.

proper persons should be entitled to carry on the business of moneylending;<sup>15</sup> (2) the courts were empowered to re-open a harsh and unconscionable transaction and were given a wide discretion regarding the remedy to be granted against a lender in appropriate cases;<sup>16</sup> (3) disclosure of certain information such as the amount of the principal and the interest payable was required.<sup>17</sup>

Furthermore, the legislature turned its attention to instalment sales when the Hire Purchase Agreements Act 1939 was enacted. Under this Act the courts were entitled to reopen harsh and unconscionable hire purchase agreements,<sup>18</sup> repossession was regulated, and a formula was adopted by which the amounts owing to the purchaser were to be computed.<sup>19</sup> The protection that was afforded to the consumer under this Act was incorporated in, and expanded upon, in the Hire Purchase Act 1971. In particular, this latter Act stipulates that the number of instalments, their amounts and other financial details must be disclosed.<sup>20</sup> There is also implied into all contracts of hire purchase, terms as to title, fitness for purpose and merchantable quantity.<sup>21</sup>

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(15) Moneylenders Act 1908, s 4.

(16) Ibid, s 3.

(17) Moneylenders Amendment Act 1933, s 8.

(18) See s 8.

(19) See ss 4, 5, 6.

(20) See ss 5, 6.

(21) SS 11, 12, 13.

Brief mention must be made also of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 which, although primarily directed at restricting the availability of credit,<sup>22</sup> do enjoin each contract covered by the regulations<sup>23</sup> to meet certain formal requirements. Contracts must be in writing, must be signed by the purchaser, and describe the goods to which they relate.<sup>24</sup> As well, the agreement must state the number and amounts of separate instalments.<sup>25</sup> In so far as hire purchase agreements are concerned the requirements as to formalities and disclosure are largely reproduced in the Hire Purchase Act 1971.

The rapid escalation in the availability and use of credit has prompted legislatures around the world to commission studies with a view to reform. For example, in 1968, United States Federal legislation, popularly known as "Truth-in-Lending" was enacted as the Consumer Credit Protection Act<sup>26</sup> and a Uniform Consumer Credit Code was prepared for adoption by the various States<sup>27</sup> following

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- (22) As McCarthy J. observed in *Credit Service Investments Ltd v Carroll* [1973] 1 NZLR 246, 257, the Regulations "...were enacted pursuant to the Economic Stabilisation Act 1948 as part of the Government's economic, monetary and fiscal policy in the control of inflationary conditions observable in the economy". To this end minimum deposits and maximum periods of credit are stipulated for certain goods. See also *Motor Mart Ltd v Webb* [1958] NZLR 773, 778.
  - (23) See Hire Purchase and Credit Sales Stabilisation Regulations 1957, reg. 2.
  - (24) *Ibid.*, reg. 3.
  - (25) *Idem.*
  - (26) 15 USCA 1601 et seq.
  - (27) National Conference of Commissioners on Uniform State Law, Uniform Consumer Credit Code (1968).

extensive investigations. In the United Kingdom the Report of the Committee on Consumer Credit in 1971<sup>28</sup> precipitated the passage of the Consumer Credit Act 1974 (UK). In Australia, reports were compiled in Queensland by the Law Reform Commission on moneylending<sup>29</sup> and in Western Australia by an Honorary Royal Commission on hire purchase.<sup>30</sup> The Standing Committee of Attorneys-General invited two committees to undertake studies on consumer credit laws and to propose comprehensive reforms. The first, known as the Rogerson Committee, operating under the auspices of the University of Adelaide Faculty of Law, presented its report in 1969.<sup>31</sup> The second, known as the Molomby Committee, conducted under the auspices of the Law Council of Australia, presented its report in 1972.<sup>32</sup> In New Zealand, the legislature's concern over the dramatic transformation to a credit society led the Minister of Justice in 1968 to instruct the Contracts and Commercial Law Reform Committee to study the law relating to moneylending transactions and to other agreements involving the extension of credit, with a view to recommending necessary reform. The result of this

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(28) Cmnd 4596. Known as the 'Crowther Committee'.

(29) Law Reform Commission of Queensland, Report on a Bill to Consolidate and Amend the Law Relating to Moneylending (1972).

(30) Honorary Royal Commission into Hire Purchase and Other Agreements (1972).

(31) Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law Relating to Consumer Credit and Money Lending (1969).

(32) Report on Fair Consumer Credit Laws to the Attorney-General for the State of Victoria (1972).

Committee's deliberations and consultations was a voluminous Report on Credit Contracts presented in July 1977.<sup>33</sup> Many of the recommendations in this Report have now received statutory recognition in the Credit Contracts Act 1981.

This Act, which came into force on 1 June 1982, has four basic objectives, namely -

- i) To prevent oppressive credit contracts and conduct;
- ii) To ensure that all terms of credit contracts are disclosed to debtors before they become irrevocably committed to them;
- iii) To ensure that the cost of credit is disclosed on a uniform basis in order to prevent deception and encourage competition, and,
- iv) To prevent misleading credit advertisements.<sup>34</sup>

In order to attain these objectives the legislature has provided for the re-opening of oppressive credit contracts,<sup>35</sup> the disclosure of information,<sup>36</sup> the regulation of credit advertisements,<sup>37</sup> and the prohibition of certain financiers and terms.<sup>38</sup> The Moneylenders Act 1908 and amendments are repealed<sup>39</sup> and the Hire Purchase Act 1971

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(33) See note 4, supra.

(34) See the Preamble to the Act; as regards the fourth objective see the discussion above in Chapter IV, Statutory Control of Advertising.

(35) Credit Contracts Act 1981, ss 9-14.

(36) Ibid, ss 15-33.

(37) Ibid, ss 34-38.

(38) Ibid, ss 39-41.

(39) Ibid, s 48.



is amended to ensure conformity and uniformity in the treatment of credit contracts.<sup>40</sup> It is against this general background, and in light of the Credit Contracts Act 1981, that the adequacy or otherwise of consumer information in the credit market falls to be assessed.

In the context of this dissertation the following questions are of primary concern to a consumer who wants credit to purchase certain goods or services, namely: what information must be disclosed? When must such disclosure be effected? Is disclosure required for all credit transactions? How is such disclosure compelled and what are the sanctions for non-compliance?

## (2) THE CONTENT OF STATUTORY DISCLOSURE

### (a) General

What must be disclosed? As the Contracts and Commercial Law Reform Committee comment<sup>41</sup>

"The simple answer is, of course, 'All the terms of the contract', but a moments reflection shows that that answer would be quite unsatisfactory".

Full disclosure of all the terms is not the answer for the following reasons:

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(40) Ibid, s 49.

(41) Credit Contracts Report, para 8.04.

(i) Debtors are seeking understanding as much as they are seeking information and consequently disclosure must be in form that renders it intelligible to the average man in the street.<sup>42</sup> To provide too much information is self defeating. The consumer can absorb only so many items of information at one time; beyond this he loses interest or does not have the time or inclination to digest the multitude of facts, and the law of diminishing returns comes into play. Detailed disclosure is required in the United States under the so-called 'Truth in Lending Act',<sup>43</sup> and the rules promulgated under this Act, which are collectively known as Regulation Z.<sup>44</sup> The Federal Reserve Board, who issued Regulation Z, were forced to concede that there was substantial opposition and justifiable criticism of Regulation Z.<sup>45</sup>

"Critics have argued not only that the numerous technical disclosures are burdensome for creditors but also that the disclosure statement is so lengthy and complicated that most consumers do not bother to read it. The criticism concludes that, in attempting to give consumers all the meaningful information they need to make an informed credit choice, Truth in Lending Legislation has gone too far and, in many cases, has only confused consumers with extraneous information not directly related to the cost of credit".

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(42) Ibid, para 8.05.

(43) The so-called Truth-in-Lending Act is subchapter 1 of the Consumer Credit Protection Act. See note 32, supra.

(44) 12 CFR ss 226.1 - 226.15 (1979).

(45) 1976 Report to Congress; cited in Goode, Consumer Credit (1978), 59.

(ii) Many contract terms are incorporated by reference to other documents which may or may not be available to, or read by, all parties.<sup>46</sup> For example, a clause that is commonly to be found in insurance proposal forms is one whereby the proponent agrees to accept the insurance company's policy 'subject to the terms and conditions to be contained therein or endorsed thereon'.<sup>47</sup> Furthermore, various terms are implied by statute into contracts. If the debtor is to be appraised of all the terms then he would need copies of all statutory provisions that impinge upon the transaction that he is entering and he would also need copies of any other documents or terms that are incorporated by reference. The fundamental objection which is recognised by the Federal Reserve Board in the United States raises its ugly head.

(iii) If on the occasion of each and every credit contract there was a meticulous and exhaustive perusal of all the express and implied terms business efficiency would be severely impaired. In light of the reopening provisions of the Act<sup>48</sup> this would not only be counter productive, in that any additional costs are likely to be passed on to the consumer, but unnecessary; that is, there is little danger involved if a consumer is taken by surprise by some unduly

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(46) Credit Contracts Report, para 8.04.

(47) See, for example, *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1939) 39 SR (NSW) 174.

(48) Ss 9-14.

harsh or onerous term as the court may reopen the transaction in these circumstances<sup>49</sup> and there is a wide discretion conferred upon the court to order relief.<sup>50</sup>

These conditions lead one to the irresistible conclusion that a balance has to be struck. There is an optimum level of information that the consumer needs if he is to make a relatively informed decision about the merits of a credit transaction and is to compare its cost with that of alternative credit sources. One writer<sup>51</sup> suggests that

"Three issues are important to the consumer who contemplates the acquisition of goods or services financed by instalment credit. First, he should assess the cost of credit; to weigh the relevant factors, the consumer must know the cash price for which he could obtain the goods or services and compare it with the total sum payable under the credit contract. Secondly, he should consider whether he can afford the commitment; to assess this, the consumer must know the size of each instalment and budget them, together with his other commitments and contingencies, against his future income. Thirdly, he should investigate whether the credit might be available more cheaply from an alternative source; to accomplish this, the consumer must know the rate of credit charges expressed in a manner which makes a ready comparison possible.<sup>52</sup>

These issues that the learned writer isolates all relate to financial particulars of a particular type of credit transaction, but it is clear that for credit

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(49) Under s 10.

(50) See s 14.

(51) O'Hare, 'Issues in Consumer Credit Reform', in Duggan and Darvall (eds), Consumer Protection Law and Theory (1980), 108-109.

(52) The underlining is my own.

transactions in general financial particulars are of the essence. Disclosure of financial particulars performs both a descriptive and a shopping function<sup>53</sup> in that the form of disclosure enables the debtor to determine whether the utility of the loan or instalment sale justifies the price, and disclosure of these financial matters provides the means whereby consumers may shop effectively for credit by comparing prices from different sources.

In addition to the disclosure of financial particulars the Contracts and Commercial Law Reform Committee recommend<sup>54</sup> that the name and address of the financier<sup>55</sup> and the express terms of the credit transaction, with the exception of terms imposed by law, be disclosed. These topics will now be considered in isolation.

(b) Financial Particulars

The difficulty facing any legislature here is to give financial particulars in a meaningful, uniform manner that would be readily intelligible to the average consumer.

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(53) Jordan and Warren, 'Disclosure of Finance Charges: A Rationale', (1966) 64 Michigan Law Review 1294.

(54) Credit Contracts Report, para 8.30.

(55) "Financier" is defined in section 2(1) of the Credit Contracts Act 1981 as "any person who (a) carries on the business of providing credit (whether or not the business is his only business or his principal business); or (b) makes a practice of providing credit in the course of a business carried on by him; or (c) makes a practice of entering into credit contracts in his own name as a creditor on behalf of or as trustee or nominee for any other person".

This task is complicated at the outset by the number and variety of credit transactions in existence with the resultant difficulty of stipulating a method of disclosure applicable to credit transactions in general.<sup>56</sup>

In order to enable the proverbial man-in-the-street to compare terms offered to him by different financiers the Contracts and Commercial Law Reform Committee recommended<sup>57</sup> that the relevant financial details, namely, the total cost of credit<sup>58</sup> and the finance rate<sup>59</sup> be quoted in a uniform manner by the various sources. Lack of uniformity in the methods adopted in indicating the price that a debtor has to pay for the credit extended to him makes comparison between the credit charges of different suppliers of credit and the relative merits of borrowing as between one type of financial institution and another difficult, if not impossible, to determine.<sup>60</sup> For example, the financier may express the credit charge rate as a flat rate, simple rate, reducible rate, compound rate, add-on rate, nominal rate or effective rate; moreover, the rate may be expressed on an annual basis, monthly or other periodic basis. In these circumstances a meaningful

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(56) See, for example, the Credit Contracts Report, para 9.01-9.06.

(57) Ibid, para 9.08.

(58) Ibid, para 9.11.

(59) Idem.

(60) Ibid, para 8.19.

comparison of credit costs is unlikely and the full play of market forces is not able to operate with the consequence that the consumer may pay more for his credit than he needs.

As mentioned above, the key elements of financial disclosure in the Credit Contracts Act 1981 are the 'total cost of credit' and the 'finance rate'. The finance rate, being the rate that expresses the total cost of credit as a percentage per annum of the amount of credit<sup>61</sup> is perhaps the item of information that will have the greatest impact upon consumers seeking and comparing credit sources. However the most vexed question in the field of financial disclosure is: What items ought to be treated by law as comprising the total cost of credit? The resolution of this question is vital for the following reasons:

i) The computation of the finance rate is totally dependent upon the calculation of the total cost of credit. It is not possible to determine the rate of the credit charge imposed in a particular transaction unless it is known what comprises the charge itself.

ii) The inclusion of certain items in the total cost of credit may be supported for the purpose of rate disclosure but inappropriate for the calculation of rebates and if the total cost of credit is to remain constant in any legislation this may require some compensating adjustment where rebates are in issue.<sup>62</sup>

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(61) See the Credit Contracts Act 1981, s 6.

(62) See the Hire Purchase Act 1971, s 23.

iii) The division of the debtor's total indebtedness as between the amount of the credit and total cost of credit may determine whether a transaction is outside the upper financial limit of the legislation<sup>63</sup> the characterisation of the transaction as oppressive,<sup>64</sup> and so on.

Two broad approaches are possible. First, the total cost of credit may be represented by the excess of the debtor's repayment obligations over the amount of credit provided to him.<sup>65</sup> Alternatively, the approach adopted in the Hire Purchase Act 1971<sup>66</sup> could be endorsed, where the total cost of credit is defined as the total amount payable less the cash price and certain disbursements specified in the definition. Logically, the former approach should be adopted as being sound in principle. However, financiers have argued that although part of the total cost of credit paid by a consumer represents a return on their investment, another part represents cost

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(63) For example, the terms as to merchantable quality and rebate entitlement do not apply where the cash price of goods disposed of on hire purchase terms exceeds \$15,000. See the Hire Purchase Act 1971, ss 12(1)(c), 23(5)(b) and the Hire Purchase (Specified Sums) Order 1980. See also the definition of a 'Controlled Credit Contract' under the Credit Contracts Act 1981, s 15(1)(f).

(64) The court is directed under the Credit Contracts Act 1981 to consider, inter alia, whether the finance rate for a contract is oppressive in reaching its decision whether to re-open the Contract or not. See s 11(2)(b)(i).

(65) Credit Contracts Report, para 9.25.

(66) S 2.



incurred in the granting of credit. This latter component, it is asserted, should not be reflected as forming part of the total cost of the credit. Bearing in mind that the 'finance rate' expresses the total cost of credit as a percentage per annum of the amount of credit, a reduction in the total cost of credit makes for a much more attractive finance rate percentage.

The Contracts and Commercial Law Reform Committee recommended<sup>67</sup> that certain disbursements should not form part of the total cost of credit, and this is implemented in the Credit Contracts Act 1981. Total cost of credit is defined as the total of all money and money's worth payable by the debtor by virtue of the credit contract, less the amount of credit provided pursuant to the contract and certain specified fees and charges.<sup>68</sup> For example, amounts payable in respect of incidental services to the debtor,<sup>69</sup> or for legal services relating to the credit contract,<sup>70</sup> or the surveys, inspections or valuations of property,<sup>71</sup> do not form part of the total cost of credit inasmuch as they are reasonable. Some of the disbursements that are excluded from constituting part of the total cost of credit are very liberal

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(67) Credit Contracts Report, para 9.28.

(68) See s 5.

(69) S 3(3)(b)(i); see the Credit Contracts Amendment Act 1982, s 2(2).

(70) S 3(3)(b)(v).

(71) S 3(3)(b)(iv).

dispensations. By comparison, in the United Kingdom the Consumer Credit Act 1974 and the Consumer Credit (Total Charge for Credit) Regulations 1977<sup>72</sup> are based on the premise that the amount of credit is to be treated as restricted to the actual financial facility received by the debtor, and does not include expenses generated by the credit transaction itself; these are classified as part of the credit charge, for they are expenses which the debtor would have avoided if he had not taken credit and accordingly their payment by the creditor cannot be said to have conferred a financial benefit upon the debtor. According to regulation 4 of the Consumer Credit (Total Charge for Credit) Regulations 1977 the total cost (charge) of credit consists of two main items; viz., first, and most obviously, the total of the interest on the credit provided under the agreement and, second, subject to exceptions, any other compulsory charge payable by the debtor as a condition of the granting of the credit. Included under this second head are charges such as creditors' administrative charges, brokers' fees, survey fees, legal fees, insurance premiums and, so far as the acquisition of goods on credit is concerned, installation and maintenance charges. Certain compulsory charges are however excluded from the total cost of credit by

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(72) S.I. 1977 No. 327; see also the Truth in Lending Act, s 106.

regulation 5. These excluded charges are essentially (1) charges payable to the creditor upon default by the debtor,<sup>73</sup> (2) charges payable even if the transactions were for cash, (3) charges for the care, maintenance or protection of land or goods where either the services are essential to preserve the land or goods or the debtor can choose with whom to make the arrangements, and (4) insurance premiums payable either before the making of the credit contract under a pre-existing policy or under any policy with an insurer chosen by the debtor except where the policy moneys are to be used to repay the credit or total charge for credit.

The Contracts and Commercial Law Reform Committee rejected this approach<sup>74</sup> in that:

i) A majority of the Committee were of the opinion that the distinction between compulsory and voluntary charges would give rise to practical difficulties. That there would be a degree of uncertainty is undeniable but this is by no means an insurmountable obstacle - the regulations under the Consumer Credit (Total Charge for Credit) Regulations 1977 have identified and categorised the various charges in some detail thereby reducing the scope for dispute.

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(73) Cf. Credit Contracts Act 1981, s 3(3)(b)(ii).

(74) Credit Contracts Report, para 9.28.

ii) The majority also believed that where a financier retains or acquires property in goods as a security, he has a legitimate interest in insisting on terms aimed at maintaining them in good condition as well as seeing them insured. As mentioned above, such charges are also excluded from the total charge for credit under the United Kingdom provisions. Furthermore the Committee, without giving reasons, were unanimous that charges incurred in regard to surveys or valuations should not form part of the total cost of credit.<sup>75</sup>

It is submitted that the far narrower category of charges excluded from constituting part of the total cost of credit under the United Kingdom legislation is preferable. What is vitally important is that the true cost to the debtor, and not the net return to the creditor, should be reflected. As one writer comments,<sup>76</sup>

"The fact that the creditor likewise does not benefit from these items is irrelevant, for what is involved is the cost to the debtor and not the benefit to the creditor".

In addition the Credit Contracts Act would exclude from the total cost of credit any reasonable amount payable for incidental services to the debtor<sup>77</sup> - it is open to speculation as to the number and quantum of miscellaneous

(75) Idem.

(76) Goode, supra, 53.

(77) S 3(3)(b)(i); the Credit Contracts Amendment Act 1982, s 2(2).

charges that will gain exemption under this head.<sup>78</sup> The position is clarified to a certain extent in the Credit Contracts Amendment Act 1982 in that 'incidental services' are defined as meaning benefits (not being benefits that consist in the provision of credit) such as the provision by the lender of insurance or services for the protection, maintenance or preservation of the property.<sup>79</sup> What benefits outside the scope of those mentioned in the amending legislation will qualify is an open question. The more exemptions granted the less accurate and useful the disclosure will be, as it will not reflect the total cost of borrowing. It remains to be seen whether financiers will attempt to exploit these exemptions so as to create the impression of a more favourable finance rate than competitors.

Turning now to the finance rate, a choice exists between nominal rate disclosure and effective rate disclosure. The Committee<sup>80</sup> explain that

"If a creditor has advanced an amount of money ('the principal') at a rate of interest of  $r\%$  per month, then it is a matter of convention how this is to be translated into an annual rate for the purpose of a comparison with other contracts. It may be translated into a nominal rate of  $12r\%$  per annum. This method is not realistic, however, since it does not take into account the fact that the creditor is able to re-invest money as soon as he receives it, and the debtor is unable to invest money he has paid out. The effective annual rate of interest is the rate of interest which, if applied to the original amount advanced, would bring the same return at the end of the contract period as the actual return calculated by adding the amount which all the intermediate monthly repayments would accumulate to if interest at the rate of  $r\%$  were paid on them until the end of the contract period".

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(78) It would be much easier to foreclose loopholes of this nature by limiting the number of exceptions or by adopting tighter wording of disclosure provisions. See Ison, *supra*, 184.

(79) See s 2(2).

(80) Credit Contracts Report, para 9.38.

While the nominal rate of computation has the merit of simplicity it is an unacceptable form of rate disclosure for it grossly understates the effective rate; that is, it fails to take into account the fact that the greater the number of payment periods a year the faster the debtor is parting with his money. For example, the nominal rate is ascertained by multiplying the period rate by the number of payment periods in a year, so that a period rate of 2% per month would produce a nominal annual rate of 24% per annum. However, to calculate the effective annual rate the first repayment has added to it the compound interest which would accumulate if it was invested for the remaining 11 months at a rate of 2% per month. Similarly, the second repayment has added to it the compound interest that would accumulate if it was invested for the remaining 10 months of the year at a rate of 2% per month. Other payments are similarly treated. Thus where interest payments are being made monthly a nominal annual rate of 24% corresponds with an effective rate of 26.8%. The difference between the effective rate and the nominal rate becomes increasingly pronounced as interest levels increase.<sup>81</sup>

The nominal annual rate does not, therefore, provide a reliable basis for comparing credit costs under contracts of differing payment intervals. However the nominal rate mode of disclosure does have an advantage in that the mode of computation is relatively straightforward by comparison.

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(81) Ibid, Appendix IV.

The choice therefore is between simplicity, on the one hand, and accuracy, on the other. The United States Regulation Z<sup>82</sup> adopts the nominal rate mode of disclosure for as one writer<sup>83</sup> as asserted

"The precision required in determining the annual percentage rate must represent a compromise between the time and costs of its calculation and the anticipated benefits of the descriptive and shopping functions provided. It is a compromise between what is mathematically feasible, and what is commercially feasible".

The New Zealand Legislature has succumbed to the tantalising simplicity of the nominal rate mode of disclosure. In the original Credit Contracts Bill it was required that both the nominal and effective rates were to be disclosed,<sup>84</sup> but the Select Committee excised the effective rate, presumably, on the ground that its computation was too complicated. Consequently, the finance rate is defined as the rate that expresses the total cost of credit as a percentage per annum of the amount of credit and that is, either (i) calculated by the financier himself by reference to the formula given in the First Schedule, or (ii) correctly derived or calculated from tables, or in accordance with a formula, prepared and published by the Government Actuary.<sup>85</sup> Where the financier employs the first

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(82) Supra, note 50.

(83) Johnson, 'The New Law of Finance Charges: Disclosure, Freedom of Entry and Rate Ceilings', Consumer Credit Reform, edited by C.C.Havighurst (1970), 36.

(84) Credit Contracts Bill, First Schedule, clause 2.

(85) Credit Contracts Act 1981, s 6.

mode of calculation the percentage derived may be rounded to the nearest quarter of one per cent<sup>86</sup> and the preparation of interest tables has made it a relatively simple operation to determine the finance rate in most transactions. Given the substantial criticism that has been directed at the Credit Contracts Act 1981<sup>87</sup> the requirement of disclosure of an effective rate as well as the nominal rate would have intensified objections to the Act. However, it is submitted that the compromise adopted in the Act is an unacceptable submission to inaccuracy; the disclosure of the effective rate would give a more much realistic measure of the price of credit and mathematical complications could be overcome by the preparation of further interest tables. Given the high rates payable for credit at the current time the difference between effective and nominal rates may be significant.

It is clear that disclosure of the finance rate lies at the heart of financial particulars that must be imparted to a prospective debtor. In the case of

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(86) Idem.

(87) See, for example: Public Issues Committee of the Auckland District Law Society, 'Criticism of the Credit Contracts Act', [1982] NZLJ 117 (some of the criticisms outlined in this critique have been resolved by the Credit Contracts Amendment Act 1982 ); Black, 'Credit Contracts', [1982] NZLJ 92; Forsell, 'A Few Comments on the Credit Contracts Act', [1982] NZLJ 219.



closed-end transactions<sup>88</sup> subject to a fixed charge,<sup>89</sup> there is no difficulty in effecting this disclosure as the amount of credit, total cost of credit and, consequently, the finance rate, are readily ascertainable.<sup>90</sup> With closed end transactions subject to variation either in the amount advanced or in the finance rate the position is more complicated. For example, a financier may agree to advance 80% of the cost of an engineering contract subject to a specified limit and here the amount of credit will not be determined at the time the contract is made;<sup>91</sup> or, a contract may be made whereby the interest payable is tied to the prevailing bank rate from time to time. How is disclosure to be effected in these circumstances? In closed-end transactions where the amount advanced is uncertain the legislatures solution is that (i) if the credit it not to exceed a known maximum amount then the amount of credit shall be deemed to be that maximum amount or (ii) if there is no such maximum amount the amount or credit shall be that amount which in the creditor's opinion will

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(88) Credit transactions in which the amount advanced is stipulated in the contract itself are closed end credit transactions. See the Credit Contracts Report, para 9.02. An illustration would be a house loan whereby the financier agrees to lend a specified sum repayable by instalments over a specified period.

(89) When the amount which the debtor is obliged to pay under the credit contract for the privilege of obtaining his advance is specified in the contract, then that transaction is subject to a fixed charge. See the Credit Contracts Report, para 9.03. For example, the debtor may be obliged to pay a fixed rate of interest, say 15 per cent per annum, on the declining balance.

(90) See the Credit Contracts Act 1981, s 16 and the Second Schedule thereto.

(91) See Credit Contracts Report, para 9.44.

be advanced.<sup>92</sup> In relation to closed end transactions with a varying interest rate a similar solution is adopted; that is, (i) if the interest rate or other component of the total cost of credit is subject to variation calculations shall be on the basis of the terms prevailing at the time the contract is made or (ii) where such rate or other component is not known at the time of contracting, the rate or amount will be that figure that the creditor deems to be likely.<sup>93</sup> Furthermore with all closed end transactions, the debtor must be appraised of the payments to be made pursuant to the contract, if those payments have been ascertained at the time the disclosure documents are prepared; that is, the amount number and frequency as well as the time and place for payment must be given.<sup>94</sup>

Disclosure of financial particulars in open-end credit transactions<sup>95</sup> occasions more difficulty. Here the financier is allowing the debtor to draw at his discretion for amounts needed by him from time to time up

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(92) Credit Contracts Act 1981, s 5(2)(a).

(93) Ibid, s 5(2)(c).

(94) Ibid. Part I of the Second Schedule, Clause 5. Note, too, that in the case of a deferred payment disposition, the cash price of the property or services must be given (Clause 7).

(95) Contracts that enable the debtor to call upon the financier's resources within a specified limit are known as open end credit transactions. As the Contracts and Commercial Law Reform Committee point out (at para 9.02 of the Credit Contracts Report) bank overdraft arrangements and credit cards which enable the holder to charge his purchases to a financier are common examples of this type of credit transaction.

to an agreed ceiling.<sup>96</sup> With open end credit contracts, where the amount advanced is revolving it is difficult to determine the actual finance rate in that the actual rate payable will vary according to the time of the month when a debtor draws against this facility; for example, by using his credit card to purchase goods or services, and the time of month when payments are made. Not only is the total cost of credit dependent upon the debtors debiting and repayment patterns, but the amount of credit is indeterminable in advance. Consequently, with regard to open end credit, or revolving credit accounts, the Crowther committee<sup>97</sup> thought

"...that the matter can best be dealt with by requiring the credit grantor to state the basis of calculation of the credit charge before the first transaction takes place - e.g. that the charge is one per cent a month on the balance carried forward from the end of the billing cycle - and to show the effective annual equivalent of the quoted rate, on the basis of annual compounding".

This view is endorsed by the Contracts and Commercial Law Reform Committee<sup>98</sup> and is adopted in part in the Credit

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(96) Credit Contracts Report, para 9.49.

(97) Report of the Committee on Consumer Credit (1971, Cmnd 4596), para 6.5.21.

(98) Credit Contracts Report, para 9.51. The Committee recommend, *inter alia*, that if the financier provides for a finance charge this should be disclosed as an effective annual rate: this could be effected by a quotation based on the total cost of credit that would be charged by the financier on the amount of the agreed ceiling for the period for which the facility is extended.

Contracts Act 1981 in that, while the financier must disclose the maximum amount of the credit<sup>99</sup> and the basis of calculation of the credit charge,<sup>100</sup> there is no requirement that the finance rate be disclosed on opening a revolving credit account.<sup>101</sup> However, other recommendations of the Committee<sup>102</sup> are implemented in full in that at the end of each billing period the financier must disclose the details outlined in Part III of the Second Schedule to the Act; that is, the opening balance, details of the credit provided, amounts paid by the debtor during the billing period, the amount and description of each charge payable under the contract that does not form part of the total cost of credit and that has been charged during the billing period, the cost of credit and the interest rate. Obviously with revolving credit accounts it is not possible to give the actual finance rate in advance, but if the debtor knows the rate to be applied to any amount owing at the end of any billing cycle, this may be of more significance to him. Finally, the financier must disclose the time and places where payments have to be made.<sup>103</sup>

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(99) Second Schedule, Part I, Clause 2.

(100) Ibid, Clause 6.

(101) Ibid, Clause 4(4).

(102) Credit Contracts Report, para 9.52.

(103) Second Schedule, Part I, Clause 5.

(c) Other Information

It is obviously important that the debtor should be able to identify and locate the financier to whom he is indebted and the Credit Contracts Act 1981 provides that the name and address of the financier must be provided.<sup>104</sup> Furthermore, all terms of the contract, other than terms implied by law, must be disclosed.<sup>105</sup> As the Committee<sup>106</sup> stress

"...the insertion in the disclosure statement of long extracts from statutes can defeat the purpose of the disclosure statement, which is to give as simple a description as possible of the express terms of the particular contract".

Not only is the provision of excessive detail likely to obscure more salient information from the debtor's consideration, but this superfluous material is confusing, makes for an unwieldy and excessively verbose document, and will impair the efficient transaction of credit business. For these reasons this limitation on the disclosure of contractual terms is to be welcomed. Little restraint is placed on the nature of the terms that may

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(104) Second Schedule, Part I, Clause 1. See also the Hire Purchase Act 1971, s 6(1)(b)(v). As the Contracts and Commercial Law Reform Committee note (at para 8.31 of the Credit Contracts Report): 'When moneylenders employed touts who made loans on tangible securities, such as pledges of personal property, the debtor found not infrequently that he could not redeem the security because he could not find the moneylender. We do not believe that such evasive conduct takes place today on any scale, but the fact remains that the interests of the debtor require him to be able to identify and locate his creditor'.

(105) Second Schedule, Part I, Clause 6.

(106) Credit Contracts Report, para 8.32.

be agreed upon, but in light of the extensive reopening provisions such restraints are strictly unnecessary.<sup>107</sup> With deferred payment dispositions of goods a statement of rights must be incorporated in the disclosure document outlining the debtors legal rights under the Act.<sup>108</sup> This topic will be dealt with below, but the underlying premise is that if a debtor is ignorant of these rights then obviously he cannot even begin to exercise these rights - disclosure in a prominent fashion goes a long way towards rectifying this ignorance.

### 3. WHEN SHOULD DISCLOSURE BE MADE?

#### (a) General

This question can only properly be answered by reference to the objectives of disclosure. Succinctly stated these objectives are:

- i) To facilitate comparison shopping; that is, to ensure that before commitment to a particular credit transaction the consumer has the information before him to compare the various sources of credit

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(107) Credit Contracts Act 1981, ss 9-14; note, however, that penalty and certain termination clauses are prohibited (see ss 40, 41).

(108) Ibid, ss 21(1)(a), 22 and the Second Schedule, Part I.

available to him. In fact, the Committee<sup>109</sup> go  
so far as to assert that

"The cardinal principal of our proposals regarding disclosure is that information should be provided in a form enabling the public to 'shop for credit'".

- ii) To facilitate rational choice as between credit and cash. If the consumer has adequate information about the cost of credit more intelligent decisions about the use of credit compared with buying for cash may be made.
- iii) To ensure that persons who enter into credit contracts are aware of their rights and obligations under that contract.<sup>110</sup>
- iv) To ensure that during the term of a credit contract the debtor can ascertain his position under that contract.<sup>111</sup>

If all these objectives are to be met there has to be provision for disclosure of information before a debtor is committed to a particular contract, and provision must also be made for post-contract disclosure.

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(109) Credit Contracts Report, para 8.08.

(110) Ibid, para 8.01.

(111) Idem.

(b) Pre-commitment disclosure

It is well recognised that disclosure of information at or immediately before the conclusion of a particular credit transaction is inadequate in itself, for by then the consumer usually will be psychologically committed to the transaction and disclosure will have only a limited effect, if at all.<sup>112</sup> Credit contracts are notoriously complicated documents and it would be totally unrealistic to expect a prospective debtor to even read, let alone understand, such a document when at the point of signature.<sup>113</sup> Very few persons would insist on a time for consideration, especially when goods are to be acquired pursuant to the credit contract.<sup>114</sup> How then is pre-commitment disclosure to be effected so as to facilitate comparison shopping for credit, the rational use of credit compared with buying for cash, and to ensure prior familiarity with the terms of the credit transactions?

Various possibilities exist, namely:

i) Advertisements and price tickets could give all relevant financial details, including the total cost of credit and the finance rate. As one writer<sup>115</sup> comments

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(112) See, for example, Credit Contracts Report, para 8.08; Ison, op. cit. 189; O'Hare, op. cit. 110; Goode, op.cit. 50; Cranston op. cit., 196.

(113) See Note, 'Truth in Lending - Time of Disclosure', [1973] Wisc. L. Rev. 290; Credit Contracts Report, para 8.08.

(114) Idem.

(115) Goode, op. cit. 50.



"This is a sound approach, not merely for the informational value to the consumer, but also (and perhaps more importantly) because of the competitive impact as between rival institutions, each of which will be reluctant to advertise rates higher than those of its colleagues".

However, this is not the complete answer because it would obviously not be possible to disclose all the terms of the contract in a credit advertisement.<sup>116</sup> Disclosure *via* the medium of advertising and on price tickets would not only fail to ensure disclosure of all requisite information but would also not ensure disclosure of information for all credit transactions; i.e., not all credit transactions are made pursuant to public advertisements or are entered into in relation to the purchase of goods that have price tickets displayed.<sup>117</sup> Furthermore disclosure of the finance rate on an across the board basis will be extremely difficult because of its dependence upon the total cost of credit that may vary from transaction to transaction.<sup>118</sup> Consequently, while pre-contract disclosure *via* the medium of advertising and on price tickets can assist the cause of informed decision making and comparison shopping, it is not sufficient in itself.

ii) The possibility of adopting standard terms of contract prescribed by law was considered by the Contracts and Commercial Law Reform Committee<sup>119</sup> but rejected as being

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(116) See Blakeney and Barnes, op. cit., 32.

(117) Credit Contracts Report, para 8.42(a).

(118) Idem.

(119) Ibid, para 8.42(b).

impracticable in the area of credit contracts given the infinite variety of terms employed in such contracts and the number of legitimate variations in the credit transactions themselves. In addition it could be argued that such an approach would inhibit the evolution of new forms of credit and be an unnecessary restriction and burden on businesses.<sup>120</sup> The adoption of standard term credit contracts would obviously ensure that any debtor who was so minded could acquaint himself with the terms of any particular type of credit transaction before committing himself, but vital variables such as the financial particulars would be absent. Consequently the adoption of standard term contracts is at best a partial reform in the arena of disclosure, and would have to be employed in conjunction with other measures aimed at the provision of information. One benefit that would flow from the adoption of standard terms would be the elimination of surplus verbiage that tends to obscure more relevant information. Judge White, Chairman of the South Australian Credit Tribunal, comments that existing documentation is concerned less with consumer understanding than industry advantage and that the industry should welcome shorter, clearer contracts to 'save time, paper and anxiety about compliance with legislation'.<sup>121</sup> However, it is clear that the adoption of standard term documents is not the complete answer to pre-contract disclosure.

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(120) Crowther Committee Report, para 6.5.7

(121) Fair Dealing with Consumers (1975), 36.

iii) The third possibility is to give the prospective debtor 'the right to be informed in writing in advance of the making of the contract of the terms available from the financier'.<sup>122</sup> This approach was tried in the Moneylenders Act 1908<sup>123</sup> which imposed a duty on moneylenders to give the borrower a note or memorandum in writing 'containing all the terms of the contract including the date on which the contract was made, the amount of the principal, and interest payable.'<sup>124</sup> This had to be signed by the borrower before any money was lent or security given for the loan and non-compliance with this provision meant that the contract and any security given pursuant to that contract was unenforceable. A copy of the note or memorandum had to be forwarded to the debtor within seven days of the making of the contract if the moneylender wanted to ensure that the contract was enforceable.<sup>125</sup> The rationale behind this provision was explained by Sugerman J in *Jaques v Pacific Acceptance Corp. Ltd*<sup>126</sup> as follows:

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(122) Credit Contracts Report, para 8.42(c).

(123) S 8.

(124) Idem.

(125) Idem.

(126) (1962) 80 WN (NSW) 1308, 1312-1313, discussing the analogous NSW provision: cited in Pannam, The Law of Moneylenders (1965), 150. See also *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1964) 110 CLR 9, 12. *Allingham v London and Westminster Loan and Discount Co. Ltd* [1940] 2 KB 630, 634.

"[F]irst, as to the initial signature of the note or memorandum, that the borrower may be in a position to inform himself as to the terms of the contract and as to certain matters in relation thereto before he binds himself by acceptance of the loan or execution of the security, and secondly, as to the delivery of the copy, in order that the borrower may have by him a complete and accurate record to which he may refer in order to ascertain the nature and extent of his liabilities. A third possible purpose has also been suggested - namely, to provide a binding record of the transaction for purposes of its reopening...".

Clearly, these objectives are laudable, but the implementation of this provision has occasioned much difficulty.<sup>127</sup> For example, the requirement that the date on which the loan was made be reflected in the note or memorandum precluded moneylenders from entering into forward commitments for the provision of finance and from offering current account or revolving credit account facilities.<sup>128</sup> In addition, it was contended that it was not possible for parties to make an effective agreement for the provision of security covering a present advance and further advances, with the consequence that the cost of securing further advances was increased due to the necessity of rearranging securities on the occasion of such further advances.<sup>129</sup> Furthermore, it was also held that it was not possible to validly vary a moneylending transaction.<sup>130</sup> As Greer L.J.

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(127) See Pannam, *op. cit.*, 149-177.

(128) Credit Contracts Report, para 8.35.

(129) Ibid, para 8.36.

(130) See *B.S. Lyle Ltd v Chappell* [1932] 1 KB 691; *Temperance Loan Fund Ltd v Rose* [1932] 2 KB 522; *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1968] 2 All ER 904, [1969] AC 340.

stated in *Temperance Loan Fund Ltd v Rose*:<sup>131</sup>

"In my judgment the only way in which the statute can be complied with in dealing with the renewal of the balance of an old loan is for the old loan to be treated as paid off and a new loan granted. The memorandum must be signed before the notional loan of that kind is made, otherwise [the provision] is not complied with".

This obviously involved the borrower in considerable additional, and unnecessary, expense. While redrafting could overcome difficulties of this nature, the idea of presenting a prospective borrower with a formal loan offer for acceptance or rejection, or of requiring a lender to provide a memorandum or note embodying all the terms before making an advance, is subject to other limitations. While the disclosure provision in the Moneylenders Act 1908 ensures that the borrower may ascertain the terms of the contract at the time of commitment, the memorandum or note is usually handed to the borrower at or just before he is given the credit documentation for signing and as a result there is not a reasonable period for detached evaluation of the financial and other data prior to contracting. This, along with the problems of delay, complexity, inflexibility, and repetition experienced under the Moneylenders Act 1908 persuaded the Committee that a pre-contract disclosure provision of this nature as a prerequisite to the validity of a credit contract was not the answer.<sup>132</sup>

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(131) *Supra*, 532.

(132) *Credit Contracts Report*, para 8.42(c).

iv) A fourth possibility would be to postpone the binding effect of an intended credit contract until the debtor has had the required information and a reasonable opportunity to appraise it.<sup>133</sup> This would overcome the objection outlined above that the timing of disclosure does not permit detached evaluation or facilitate shopping for credit. While this approach has considerable merit the Committee rejected it in favour of the final possibility.

v) The debtor should be afforded a right to rescind the contract within a reasonable time of the required disclosure being made to him.<sup>134</sup> This possibility, and the one mentioned above, would ensure that the prospective debtor knew the terms of a credit contract before that contract became irrevocably binding upon him, and would enable him to compare the terms of the various sources of credit available to him. From the point of view of the consumer it matters little whether the binding effect of a proposed credit contract is suspended for a stipulated period, or whether he is afforded a right to cancel that contract over a similar time period.

Having canvassed the various possibilities to point-of-sale disclosure, attention may now be focussed upon the legislature's response. As mentioned in the chapter on Statutory Control of Advertising, provision is made in the Act for the disclosure of the finance rate in credit

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(133) Ibid, para 8.41.

(134) Ibid, para 8.43.

advertisements where the advertisement states a rate of interest,<sup>135</sup> but this is only a partial and secondary response to the problem of disclosure. In order to facilitate rational choice and comparison shopping the legislature has made extensive provision for "initial disclosure" and has permitted the prospective debtor a period of reflection.

The Credit Contracts Act 1981 provides that every creditor who enters into a "controlled credit contract"<sup>136</sup> must ensure that initial disclosure of the contract is effected before the contract is made or will be made not later than the end of the fifteenth working day after the contract was made.<sup>137</sup> Initial disclosure is to be given in one or more legible documents and must encompass all the information, statements and other matters specified in the Second Schedule.<sup>138</sup> Furthermore, the debtor may cancel such a credit contract not later than the end of the third working day after the day the initial disclosure is made.<sup>139</sup> The joint objective of these provisions is to ensure that the debtor has sufficient information at his disposal to assess the merits and demerits of a particular transaction

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(135) Supra; see the Credit Contracts Act 1981, s 36.

(136) The term "controlled credit contract" is defined in s 15 of the Act. See the discussion below at 412. Basically all credit contracts entered into by professional financiers as creditors, or by any person as creditor through the instrumentality of a professional intermediary or credit contract that has been prepared by such professional intermediary, fall within the definition.

(137) Credit Contracts Act 1981, s 16.

(138) Ibid, ss 20, 21.

(139) Ibid, s 22.

and the three "days of grace" enable him to determine not only whether he wishes to be finally bound, but also to ascertain whether more attractive terms are available elsewhere. This topic of "debtor's reconsideration" may appropriately be subsumed under the head of "pre-commitment" disclosure as the opportunity for appraisal will frequently come after the signing of the credit documentation. However, not only must disclosure be effected before a credit contract is enforceable,<sup>140</sup> but the statutory "cooling-off" period must have elapsed before a debtor is irrevocably bound by the terms of the credit contract. However, as mentioned above,<sup>141</sup> it matters little to the consumer whether the binding effect of a proposed credit contract is suspended until a debtor has had the necessary information and a reasonable opportunity to examine it, or whether he is afforded a right to cancel that contract within a stipulated period after the receipt of the requisite information - in effect, pre-contract disclosure is achieved.

Cancellation has the effect of extinguishing the debtor's liability and entitles him to recover payments made and goods tendered in part exchange or for any other purpose.<sup>142</sup> Furthermore, the creditor must ensure that

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(140) Ibid, s 24. But note that this section is to be read subject to sections 31 to 33 of the Act.

(141) Supra, at 400.

(142) Credit Contracts Act 1981, s 23.



all security given by the debtor pursuant to the credit contract is released<sup>143</sup> and, subject to certain exceptions, the debtor is not liable to pay any part of the cost of credit or other charges.<sup>144</sup> It is vitally important to note that the purchaser who has received goods<sup>145</sup> cannot cancel completely; he can only cancel 'the credit part' of the contract.<sup>146</sup> Generally, therefore, where a debtor has entered into a credit sale or hire purchase agreement for the purchase of goods he may cancel the credit provisions of the contract by giving written notice of cancellation to the creditor or dealer and by paying the cash price not later than 15 working days after giving notice.<sup>147</sup> Dugdale<sup>148</sup> comments that

"It was desired to avoid a situation where for example someone could take delivery of a car under a hire purchase agreement on a Friday, use it until the following Wednesday and then with some thousands more miles on the clock, return it and demand his deposit back".

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(143) Ibid, s 23(1)(b)(ii).

(144) Ibid, s 23(1)(c).

(145) Under a controlled credit contract that is (a) a deferred payment disposition of goods where the debtor has received a statement of his rights to cancel; or (b) a deferred payment disposition comprising a sale of property by auction; or (c) a deferred payment disposition of property that the debtor wishes to keep; see section 22(2)(a), (b), (c). Note the amendment effected by the Credit Contracts Amendment Act 1982, s 4.

(146) Credit Contracts Act 1981, s 22(2).

(147) Ibid, s 22(2)(d), (e).

(148) The Credit Contracts Act 1981 (1981), 52.

Moreover, cancellation is precluded altogether in the case where the credit is provided for a specified period not exceeding 2 months and no part of the credit is used, with the knowledge of the creditor, to pay amounts owing to the creditor under another credit contract.<sup>149</sup> This provision is designed to prevent the debtor from taking advantage of a series of "cooling-off" periods to his own benefit in short term transactions, but is also framed in such a way to avoid the potential abuse of a creditor evading the cancellation provisions by a series of short term contracts of the "roll over" variety with a particular debtor.<sup>150</sup>

How effective then are these measures when assessed against the Contracts and Commercial Law Reform Committee's primary objective to enable the public to shop for credit? Very rarely will advertisements do more than indicate the availability of credit and the desirability of, say, buying now rather than later. If a prospective debtor wishes to be appraised of financial particulars in sufficient detail to make an informed choice, he will have to visit or contact each alternative credit outlet. Needless to say this will be a time consuming exercise and it may well be that the prospective debtor will settle for the first loan or credit transaction that "sounds" reasonable, rather than

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(149) Ibid, s 22(4).

(150) See the Credit Contracts Report, para 8.48.

acquaint himself with the terms available from a large number of creditors before making a selection. True "shopping for credit" would entail the latter course of action. It is submitted that in the usual case the consumer will first consider the question of credit at the time when he sees goods that are to his liking; if he elects to buy those goods pursuant to a credit sale agreement or hire purchase agreement initial disclosure will usually be effected at or immediately before the conclusion of the particular transaction. Such a consumer is not entitled to return such goods in terms of the cancellation provisions and so if he elects to cancel the credit provisions of the contract he must "front up" with the cash within 15 days of giving written notice of such cancellation. If he does not have funds to meet the cash price he must frantically scour the credit market in the three day "grace" period after initial disclosure in an endeavour to find an alternative, and cheaper, avenue of finance. It is suggested that this would not be an attractive, and hence likely, proposition for the average consumer who has the desired goods in hand. Consequently, it is suggested that significant practical barriers could stand in the way of the Committee, and the Act, achieving one of its avowed objectives; namely, the shopping for credit. The extent to which consumers will utilise rights of cancellation conferred by the statute remains a matter for speculation but, at least, the legislature has ensured that the effectiveness of the cancellation provisions will not flounder through ignorance of their existence. A

prominent statement of the rights under the cancellation provisions must accompany the disclosure documentation in the case of deferred payment dispositions of goods.<sup>151</sup>

Finally, a potential drawback of the statutory cooling off period is that under a deferred payment disposition of goods the financier may be reticent about advancing loan monies or finance until this period has elapsed and a consumer may be inconvenienced if he wishes to finalise a transaction quickly. However this is a small price to pay when measured against the advantage of reconsideration that ensures a reasonable period of detached evaluation of the financial and other data as well as an opportunity to compare alternative credit arrangements - whether a consumer will, in practice, avail himself of this opportunity is of course another matter. Furthermore it is to be hoped that the existence of the cancellation provisions will have a beneficial impact in making creditors more reticent and cautious in the construction of their contracts and imposition of charges for credit.<sup>152</sup>

(c) Post Contract disclosure

One objective of disclosure provisions is to ensure that during the term of the credit contract the debtor can

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(151) Credit Contracts Act 1981, Second Schedule, Part I, Clause 8. Recognition of the futility of legislation conferring rights where those rights are either unknown or are not readily understood by consumers led the legislature to insist upon documents explanatory of such rights under the Hire Purchase Act 1971, ss 26(1)(b), 28(1), 28(3), 29(1).

(152) The same could be said for re-opening provisions.

ascertain his position under the contract. Statutory endorsement of this objective was found in both the Moneylenders Amendment Act 1933<sup>153</sup> and the Hire Purchase Act 1971<sup>154</sup> in that provision was made for debtors under moneylending contracts and hire purchase agreements to obtain copies of their respective agreements as well as statements of account.<sup>155</sup>

Post contract disclosure under the Credit Contracts Act 1981 may be briefly canvassed under the following heads:

i) Request disclosure: A debtor or guarantor under a controlled credit contract may request in writing that the creditor disclose to him all or part of the information specified in Part IV of the Second Schedule of the Act.<sup>156</sup> Upon receipt of a specified fee<sup>157</sup> the creditor must ensure that disclosure of the information or documents requested shall be made not later than the end of the fifteenth working day after the day the fee is received.<sup>158</sup> In order to avoid vexatious inquiries and the disruption of normal business, a creditor is relieved of compliance with a request if disclosure of the information or documents requested has been made during the three months preceding receipt of a request.<sup>159</sup>

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(153) S 11.

(154) S 19.

(155) Sections 11 and 19 of the Moneylenders Amendment Act 1933 and the Hire Purchase Act 1971, respectively, are repealed by Section 49 of the Credit Contracts Act 1981.

(156) See ss 19, 21(1)(b); disclosure of outstanding amounts, payments required, details of alterations in terms and of previous disclosure, as well as the finance rate under a revolving credit contract, may be requested.

(157) See s19(b) and the Second Schedule, Part IV, Clause 6.

(158) S 19.

(159) Idem.

ii) Modification disclosure: The Act also makes provision for the situation where the terms of a controlled credit contract are modified or varied<sup>160</sup> and such a contract is known as a modification contract.<sup>161</sup> Where a creditor enters into a modification contract he must ensure that disclosure of the information specified in Part II of the Second Schedule is made,<sup>162</sup> either before the contract is made, or, not later than the end of the fifteenth working day after that contract is made.<sup>163</sup> Clearly the problems encountered under moneylenders' contracts with regard to the variation of such agreements are laid to rest.<sup>164</sup>

iii) Continuing disclosure: Furthermore where revolving credit contracts<sup>165</sup> are involved the legislature have recognised that a different disclosure provision is needed by virtue of the distinct nature of this credit.<sup>166</sup> A creditor under a revolving credit contract must ensure that

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(160) S 17.

(161) See the definition in s 2.

(162) See ss 17, 21(1)(a). Disclosure of all the terms of the modification contract other than those implied by law, total cost of credit and the finance rate is required. Disclosure of the finance rate and total cost of credit is not required in the case of a modification of a revolving credit contract.

(163) S 17(1).

(164) Supra, . See also the Credit Contracts Report, para 8.37.

(165) See the definition in s 2.

(166) S 18.

not later than the end of a specified period<sup>167</sup> after the end of each billing period during which credit has been provided under the contract or the whole or part of the cost of credit has become due, that he discloses all the information specified in Part III of the Second Schedule.<sup>168</sup>

This comprehensive set of provisions ensures that a debtor may ascertain his position during the currency of a credit contract. Disclosure of financial particulars, such as the amount outstanding under a credit contract, is of vital importance to a debtor; e.g., a purchaser under a hire purchase agreement may complete the purchase of goods by paying the unpaid balance at any time during the continuance of the agreement<sup>169</sup> and if he does so he is entitled to certain statutory rebates.<sup>170</sup> However, it is not only the financial particulars that are of concern to debtors, but other terms as well. The Act ensures that a debtor has, or may obtain, a copy of the agreement encompassing all the terms of the Credit Contract other than those implied by law<sup>171</sup> and where any variation of those terms occurs, the terms of the contract effecting that variation must be disclosed.<sup>172</sup>

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(167) As defined in s 18(2).

(168) See ss 18, 21(1)(a). Disclosure of the opening and closing dates of the billing period, the opening and closing balances, as well as details of the credit provided, amounts paid, charges and cost of credit, is required.

(169) Hire Purchase Act 1971, s 22.

(170) Ibid, s 23.

(171) Ss 16, 21(1)(a).

(172) S 21(1)(a).

Post contract disclosure *vis-a-vis* credit contracts is also required under the Hire Purchase Act 1971. A vendor may not exercise any power of repossessing goods subject to a hire purchase agreement unless the purchaser is in default under that agreement and the vendor has served the purchaser with a notice in writing in the form set out in the Third Schedule to the Act, specifying the default complained of, and, if the default is capable of remedy, requiring the purchaser to remedy the default 'within a period of not less than 10 days after service'.<sup>173</sup> Where the vendor has served the notice required by section 26 he must wait for the period specified therein before exercising his right to repossess. Within 21 days of taking possession of the goods the vendor must serve on the purchaser and every guarantor a notice in the form set out in the Fourth Schedule.<sup>174</sup> The purchaser is made aware of his rights following repossession in a clearly worded statement. He is advised that he has three courses of action open to him: namely, that (i) he may within 21 days of service of such a

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(173) Hire Purchase Act 1971, s 26(1). An exception to the general requirement of notice is provided by s 26(4) whereby a vendor is excused from compliance with s 26(1) if 'he has reasonable grounds to believe that the goods comprised in the hire purchase agreement have been or will be destroyed, damaged, endangered, disassembled, removed or concealed contrary to the provisions of the agreement'. As Dugdale Hire Purchase Law (1978), 35, comments: 'It was no doubt sensible for the legislature to recognise that there are some purchasers who are likely to react to the receipt of the Statutory notice by folding their tents like the Arabs and as silently stealing away'.

(174) Hire Purchase Act 1971, s 28(1).



notice remedy his default by paying the arrears together with various reasonable costs and expenses incurred by the vendor including costs of repossession, storage, repair and maintenance<sup>175</sup>; or (ii) he may within the same period introduce a purchaser prepared to buy the goods at a price not less than the vendor's estimate of value set out in the notice;<sup>176</sup> or (iii) he may at any stage up to the time when the vendor has bound himself to sale settle the agreement by paying the net balance due thereunder plus the various reasonable costs and expenses of the vendor.<sup>177</sup>

If none of these options is exercised the vendor is, in the usual case,<sup>178</sup> obliged to sell the goods and the purchaser is advised of his rights regarding the sale, the obligations on the vendor, and of his entitlement to a refund in the event of their being any excess or, conversely, his residual liability to the vendor.<sup>179</sup>

The Act also stipulates that a hire purchase agreement must incorporate a statement in the form set out in Part II of the First Schedule to the Act.<sup>180</sup> This statement advises the purchaser of his right to a copy of the agreement, of his right to assign with the written consent of the vendor<sup>181</sup> and of his right to early completion and the corollary of rebate entitlement.<sup>182</sup>

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(175) Ibid, s 29(1)(a).

(176) Ibid, s 29(1)(b).

(177) Ibid, s 30.

(178) Ibid, s 28(5).

(179) Ibid, s 34.

(180) Ibid, s 6(1)(d).

(181) Ibid, ss 20, 21.

(182) Ibid, ss 22, 23.

Provisions such as the above go a long way towards ensuring the effectiveness of legislation in that consumer ignorance of their legal rights may lead to the non-litigation of many valid claims, and result in the continuance of undesirable practices and mischief that the legislation set out to prevent.

#### 4. TRANSACTIONS TO WHICH THE DISCLOSURE PROVISIONS APPLY

The identification of transactions that should be subject to the rules as to disclosure is a controversial and difficult issue. While the term "credit contract" must be defined widely with a view to subjecting most credit contracts to the unconscionability doctrine, such a wide definition would be unsuitable in respect of the disclosure requirements.<sup>183</sup> For example, the small investor in a company or the depositor of money with a bank should not be obliged to inform the company and the bank, respectively, of the terms of the transaction.<sup>184</sup> Consequently the Credit Contracts Act 1981 has restricted the requirements as to disclosure to a narrower class of credit contracts than that embraced by the general definition. The disclosure provisions apply in the main to 'controlled credit contracts' and categorisation of this limited class of credit contracts has been done by reference to the following considerations:

- (a) Status of the creditor; (b) Status of the debtor;
- (c) Nature of the transaction.

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(183) See the Credit Contracts Report, para 8.23.

(184) Idem.

a) Status of the creditor

A controlled credit contract is defined as meaning

"...a credit contract - (a) where the creditor, or one of the creditors, for the time being is a financier acting in the course of his business; or (b) which results from an introduction of one of the parties to the contract to another such party by a paid adviser; or (c) that has been prepared by a paid adviser".<sup>185</sup>

Clearly the intention of the legislature is to exclude from the ambit of the disclosure provisions transactions where the credit is extended by private persons. As the Contracts and Commercial Law Reform Committee remarked

"Simple loans or other credit transactions between members of a family or between neighbours or friends, should not, we think, be subjected to the legal formalities appropriate to transactions at arms length of a more formal nature".<sup>186</sup>

Furthermore, while a person who is in the business of extending credit can be expected to acquaint himself with the statutory rules and to comply with them the same cannot be said of the private creditor, such as a private individual making a casual loan to a friend or disposing of his car on instalment terms. In any event, if any term of such a private credit transaction is oppressive, or is oppressively exercised, the court may re-open the contract.

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(185) Credit Contracts Act 1981, s 15(1).

(186) Credit Contracts Report, para 8.24.

The basic definition of controlled credit contract refers therefore, to credit transactions where the person extending the credit is a financier, or where the credit contract is made through, or prepared by, a paid adviser.<sup>187</sup>

The term 'financier' embraces those persons who carry on the business of providing credit, or who make a practice of providing credit in the course of a business, or who make a practice of entering into credit contracts in their own names as creditors on behalf of other persons.<sup>188</sup> Any controls and exemptions by reference to the status of the creditor run into problems of definition. Under the Moneylenders Act 1908, for example, the legal categorisation of a person as being a moneylender was vital, in that it was the identification of the lender and not the fact of the loan that attracted the provisions of the moneylenders legislation. The basic definition of moneylender as 'a person whose business is that of moneylending or who advertises or announces himself or holds himself out in any way as carrying on that business'<sup>189</sup> occasioned considerable difficulty in interpretation.<sup>190</sup> Similarly the same could be identified as being a potential problem with regard to the term "financier" in the Credit Contracts Act 1981. Fortunately though, the definition of "financier" is wider than the corresponding definition of "moneylender" under the

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(187) Credit Contracts Act 1981, s 15(1).

(188) Ibid, s 2(1).

(189) Moneylenders Act 1908, s 2.

(190) See Pannam, op. cit., 33, and the cases there cited.

Moneylenders Act 1908, and specific reference is made to a person 'who makes a practice of providing credit in the course of a business carried on by him'.<sup>191</sup> The question as to whether a person is a financier, or not, may be answered more easily by reference to the regularity of transactions, than by reference to the difficult concept of carrying on business as a financier. Furthermore the dire consequences visited upon transactions negotiated by unregistered moneylenders and the necessity for registration<sup>192</sup> may be said to have promoted much litigation about the scope and ambit of the term, moneylender. Categorisation as a financier entails compliance with the disclosure provisions but the consequences of non-compliance are not so drastic.<sup>193</sup> and there is no requirement of registration. So the Committee thought it reasonable to expect such a person in doubt as to his status to comply with the disclosure provision out of an abundance of caution and the term "financier" is unlikely to generate as much controversy.<sup>194</sup>

The Credit Contracts Act 1981 demands disclosure, not only in credit contracts where the credit is extended by

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(191) Credit Contracts Act 1981, s 2(1).

(192) A moneylender had to be registered in accordance with section 4 of the Moneylenders Act 1908, and abide by the restrictions therein imposed. Non-compliance with any part of section 4 rendered the transaction null and void. See *Ansford v New Plymouth Finance Co* [1933] NZLR 209; *Re A.R. Mackay Ltd* [1971] NZLR 289; cf *Combined Taxis Cooperative Society v Slobbe* [1972] NZLR 354.

(193) See the Credit Contracts Act 1981, ss 24-33 and the discussion below.

(194) Credit Contracts Report, para 8.28.

financiers, but also in those credit contracts where paid advisers are involved.<sup>195</sup> The term "paid adviser" encompasses any person who 'acts for reward as an adviser to, or as a trustee, nominee, or agent of, one or more of the parties' to a credit contract.<sup>196</sup> Clearly the legislature's intention is that the activities of the burgeoning body of professional intermediaries, such as solicitors, mortgage brokers and trustees, should be regulated. Therefore, the disclosure provisions apply to credit contracts made through the instrumentality of these intermediaries<sup>197</sup> and to credit contracts prepared by such persons<sup>198</sup> notwithstanding the fact that both creditor and debtor may be private persons. However, such transactions negotiated through, or prepared by, paid advisers are clearly distinguishable from the private transaction in the strict sense where both parties will usually be in a position of equal bargaining power.

b) Status of the debtor

Exempted from categorisation as controlled credit contracts are those credit contracts where the debtor can be presumed to be capable of looking after himself. For example, the disclosure provisions do not apply where the debtor himself is a financier and consequently must himself know

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(195) S 15(1)(b), (c).

(196) S 2(1).

(197) S 15(1)(b).

(198) S 15(1)(c).

and comply with the laws which oblige him to make disclosure to others.<sup>199</sup> Similarly where the debtor is the Crown, a local authority or a Government agency<sup>200</sup> or a large company,<sup>201</sup> or where the total amount of credit outstanding between the same creditor and debtor is not less than \$250,000<sup>202</sup> then the disclosure provisions do not apply.

The Credit Contracts Act 1981 also ensures that members of the public who subscribe for debentures or securities issued by companies are not covered by the disclosure provisions as it would be absurd if the investor had to make statutory disclosure of terms better known to the debtor.<sup>203</sup> Similarly, no sound basis for disclosure exists where every party to a credit contract is a body corporate related to every other such party to the contract.<sup>204</sup>

The Contracts and Commercial Law Reform Committee considered whether the reasoning, that no disclosure be required where the debtor can be presumed to look after his own interests, would justify the exclusion from the ambit of the disclosure provisions transactions in which

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(199) S 15(1)(d)(i).

(200) S 15(1)(d)(ii).

(201) S 15(1)(d)(iii). The company must have a paid up capital of at least \$1,000,000 or must be a company related to such a company.

(202) S 15(1)(f).

(203) S 15(1)(g).

(204) S 15(1)(e).

the debtor is a businessman.<sup>205</sup> However, the Committee concluded that ordinary businessmen could not be treated in the same way as financiers in that they did not possess the same financial expertise.<sup>206</sup> This is undoubtedly the case with many unincorporated traders, small partnerships and even small companies that are ill-equipped to bargain on equal terms with creditors and so it is appropriate that they should enjoy the full benefit of disclosure.

c) Nature of the transaction

The nature of certain transactions renders them for various reasons unsuitable for the imposition of general or even limited disclosure requirements. Consequently, some transactions are for sound reasons of business efficacy exempt from the disclosure provisions. For example, where banks' customers, without obtaining the prior consent of their respective banks, 'go into overdraft', or exceed the agreed limit of overdraft facilities extended to them, an intolerable burden would be placed upon banks if they were obliged to make statutory disclosure whenever such an overdraft were created or extended.<sup>207</sup> Similarly contracts that facilitate and form part of import/export transactions<sup>208</sup> and contracts entered into pursuant to an approved superannuation scheme<sup>209</sup> are exempt transactions.

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(205) Credit Contracts Report, para 8.27.

(206) Idem.

(207) Credit Contracts Act 1981, s 15(2).

(208) Ibid, s 15(1)(k).

(209) Ibid, s 15(1)(j). See also s 2(1) as to an "approved superannuation scheme".



Other contracts such as those entered into pursuant to revolving credit contracts and those for the modification of controlled credit contracts are exempted from the general disclosure provisions in that special provision is made for these contracts.<sup>210</sup> For the same reason credit agreements made otherwise than at appropriate trade premises are subject to the rules specified in the Door to Door Sales Act 1967<sup>211</sup> and are exempt transactions for purposes of the Credit Contracts Act 1981.<sup>212</sup>

Finally, it should be noted that the Hire Purchase Act 1971 covers both *Helby v Matthews*<sup>213</sup> and *Lee v Butler*<sup>214</sup> type agreements<sup>215</sup> and the disclosure provisions in that Act apply therefore to both varieties of agreement.

## 5. SANCTIONS FOR NON COMPLIANCE

The Credit Contracts Act 1981 provides for two basic sanctions for non-compliance with the disclosure provisions.

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(210) See ss 17, 18 and the Second Schedule, Part II and Part III. See also the Credit Contracts Report, para 8.37.

(211) Ss 5, 7; see discussion of this Act, infra.

(212) S 15(1)(1).

(213) Supra.

(214) Supra.

(215) Hire Purchase Act 1971, s 2(1).

First, no person other than the debtor may enforce a controlled credit contract, or any right to recover property to which the contract relates, or enforce any security given pursuant to the contract, until the requisite disclosure is made.<sup>216</sup>

Second, failure to make disclosure results in a loss to the creditor of part or all of the total cost of credit payable under the contract.<sup>217</sup> The exact computation of the amount forfeited is dependent upon the nature of the disclosure provision that is breached and the time when disclosure is made. For example, if initial disclosure is not made in accordance with the Act the debtor's liability to pay a specified amount is extinguished.<sup>218</sup> This specified amount is the smaller of (a) an amount equal to three times the part of the total cost of credit that relates to the period from the day the contract is made until the earlier of the following days: (i) the day on which initial disclosure is made; (ii) the day that is 8 months after the day the contract is made; (b) the total cost of credit payable under the contract.<sup>219</sup> Accordingly for any medium

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(216) S 24; subject, however, to ss 31-33.

(217) Ss 25-28; The Credit Contracts Bill, s 27, provided that if initial disclosure was not made within 14 working days after the the day when the contract was made, liability for the total cost of credit was extinguished completely; this was considered unduly harsh by the Statutes Revision Committee who inserted the current and, in this writers view, more acceptable provision. To visit such drastic consequences upon non-disclosure could be counter-productive; for example, inordinate delays in effecting credit transactions through a meticulous attention to every conceivable detail.

(218) S 25.

(219) S 25(2).

or long term contract it is highly unlikely that a creditor will forfeit the total cost of credit, but will forfeit a lesser amount.

Notwithstanding non-compliance with the disclosure provisions outlined in the Act relief may be accorded the debtor if he shows that:

- "(a) the failure was due to inadvertence or to events outside the control of the creditor, and
- (b) disclosure was made as soon as reasonably practicable after the failure was discovered by the creditor or brought to his notice; and
- (c) where disclosure documents relating to the contract state as the finance rate of the contract a rate that is less than the correct finance rate, the creditor has reduced the finance rate of the contract to the rate disclosed in those documents; and,
- (d) the creditor has compensated or offered to compensate the debtor under the contract for any prejudice caused the debtor by the failure".<sup>220</sup>

In these circumstances the penalties for non-compliance do not apply. Even where the creditor cannot satisfy these criteria he may apply to court for an order directing that the penalties not apply or that a lesser penalty be imposed.<sup>221</sup> In exercising its discretion the court must have regard to whether the creditor is a financier, the extent and reasons for non-disclosure, whether the debtor has been prejudiced by the non-disclosure and any other

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(220) S 31.

(221) S 32.

circumstances as the court thinks fit.<sup>222</sup> Finally the penalties for non-disclosure may be waived by a debtor provided he has received written notice of the failure and his rights that arise from the failure.<sup>223</sup>

Under the Hire Purchase Act 1971 a failure to observe the disclosure provisions<sup>224</sup> amounts to an offence against the Act punishable by a fine not exceeding \$500.<sup>225</sup> Similarly it is an offence against the Credit Contracts Act 1981 to produce a misleading credit advertisement and a fine of up to \$5,000 may be imposed for any contravention of sections 35 to 37.<sup>226</sup>

The extent to which these sanctions will promote compliance is a matter for speculation. While the vast majority of creditors will comply voluntarily with the disclosure provisions, it is clear that really effective sanctions are required to secure the compliance of the fringe operators. As Ison<sup>227</sup> comments

"If profit margins are at stake, the incentive of non-compliance can be strong. Unless honest merchants who willingly comply are to be penalised by less scrupulous competitors, the sanctions for violation of the (disclosure) legislation must be sufficiently tough and sufficiently certain of application that compliance is very close to 100 percent. If a government is not willing to enact tough sanctions and to provide the resources for their consistent application, it would be better not to have enacted compulsory disclosure legislation at all".

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(222) S 32(2).

(223) S 33.

(224) See, for example: ss 26(1), 26(5).

(225) S 48.

(226) S 38.

(227) Op. cit., 190.

On the face of it the sanctions for non-compliance under the Credit Contracts Act 1981 are sufficiently tough. Loss of all or a substantial part of the total cost of credit is in itself a significant incentive to compliance.

However, the effectiveness of this sanction and the non-enforcement sanction<sup>228</sup> have been greatly impaired by the overly generous savings sections, namely sections 31 to 33.

For example, if a creditor fails to make initial disclosure of the cost of credit, certain of the contract terms, and even the finance rate, he may still be excused non-compliance if he successfully shows: (1) that the failure was due to inadvertence; (2) that he made disclosure as soon as reasonably practicable after the debtor brought this failure to his notice, and; (3) that he has offered to compensate the debtor under the contract for any prejudice caused to the debtor by the failure.<sup>229</sup> Often the question of compliance will never arise as debtors, ignorant of their legal rights, will not take steps to secure disclosure. Furthermore adjudications of the type envisaged under section 32 involves a decision making process the cost of which will generally be in excess of the amount in issue. Consequently a strong argument may be advanced in favour of strict liability in the event of there being non-compliance. This may seem like rough justice, but it has the advantages of

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(228) S 24; i.e. contract may not be enforced before disclosure.

(229) S 31.

certainty, of avoiding litigation on the amount of the penalty, and of creating a substantial inducement to compliance. As a practical matter, financiers and other creditors are not likely to lose the total cost of credit in many transactions at all, and the absence of savings sections would not be any too severe.

## 6. CONCLUSIONS

It is generally accepted that many of the problems associated with the marketing of credit may be traced to the paucity of information available to a prospective debtor at the time when he makes the decision whether or not to use credit or which source of credit to pursue.<sup>230</sup> Consequently, the enactment of rules designed to facilitate rational choice and decision-making is a most meritorious development from the point of view of the prospective debtor and from the point of view of the economy as a whole - the greater the extent to which consumers are not fully or properly informed, the greater the extent to which the market cannot be said to be competitive and the greater the risk that a misallocation of resources will result.

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(230) See for example: Report of the Royal Commission on Banking and Finance (1964), 207, 366 (Canada); Final Report of the Select Committee of the Ontario Legislature on Consumer Credit (1965), 29-41; Royal Commission on the Cost of Borrowing Money, The Cost of Credit and Retail Matters in the Province of Nova Scotia, Final Report (1965), 363-387; Molomby Committee Report, para 1.2.5; Crowther Committee Report, para 6.5.1; Credit Contracts Report, para 8.18.

In legislating for disclosure, recognition must be extended to the fact that the provision of too much information is counter productive as a consumer can absorb only a certain quantity of information at one time and beyond this optimum point the law of diminishing returns is operative. The Credit Contracts Act 1981 does not require the disclosure of terms implied by law but all other terms must be disclosed. The danger here is that much relevant information may be obscured in the midst of unnecessary padding and in order to prevent this some consideration could be given to prescribing statutory forms for credit contracts, with standard sets of terms laid out in uniform manner. The task of drawing up such standard form credit contracts could be allocated to a Consumer Affairs Department<sup>231</sup> and potential disadvantages that such standard form documents would inhibit the evolution of new forms of credit and be a burden on businesses could be easily overcome if consultation with interested parties was required on a regular basis, e.g. the Finance Houses Association (Inc.), the Retailers Federation (Inc.). The N.Z. Retailers Federation have already produced an 'official conditional purchase agreement' that is a short, clear document that saves time, paper and anxiety about compliance with the provisions of the Hire Purchase Act.

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(231) See Chapter VI, Conclusion, infra.

It is clear that disclosure of financial particulars and, more specifically, the finance rate, has the greatest capacity to promote shopping for credit and to stimulate competition in the credit market. This is well recognised in the Credit Contracts Act 1981 with the result that the finance rate and other financial particulars such as the amount of credit and total cost of credit must feature prominently in most disclosure documentation. Furthermore the Act ensures that the finance rate is quoted on a uniform basis so that comparisons may be readily made. The effectiveness of such disclosure when measured against the avowed objective of promoting shopping for credit is, however, open to considerable doubt. In terms of the Act disclosure only has to be made within 15 working days after the day the contract is made and the consumer for practical reasons is unlikely to shop around for credit after he has acquired goods pursuant to a deferred payment disposition. He cannot return the goods subject to this deferred payment disposition and may only cancel the 'credit part' of the transaction if he can find the cash price for those goods. For an effective 'shopping for credit' regime consumers must be appraised of the finance rate of various credit providers before committing themselves to the purchase of particular goods and services. Advertisements for credit and price tickets offer the best means for such disclosure but



as has been mentioned earlier, mandatory disclosure of the finance rate in this area has been rejected (i) due to the dependence of the finance rate on the total cost of credit which may vary from transaction to transaction and (ii) because many loans are not arranged in conjunction with the purchase of goods, or made following public advertisements. Do these considerations stand in the way of a mandatory disclosure provision to the effect that retailers and other sellers of goods who advertise the monthly or weekly instalments at which goods are available should disclose, with equal prominence, the finance rate? With respect, they do not. The total cost of credit in respect of hire purchase transactions is readily calculable by a retailer who fills in the statutory form as prescribed by the Hire Purchase Act 1971;<sup>232</sup> that is, the additional cost *over and above* the equivalent cash transaction for the particular commodity. Components of this additional cost are specified as the finance charge for the relevant period, the booking fee, maintenance and repair charges and other miscellaneous charges which must be specified. It is current practice for retailers to specify a cash price in respect of advertised goods and to indicate further that the consumer can acquire the goods for, say, '\$12.57 per week or \$55.68 per month'. In order to arrive at these specific figures the retailer must have done the

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(232) See the new Part I of the First Schedule to the Hire Purchase Act 1971 as inserted by the Credit Contracts Act 1981, s 49(5)(a).

calculations in respect of the particular product as specified in the Hire Purchase Act 1971 and must therefore be in a position to specify the finance rate for that transaction. Similarly where the retailer envisages a disposition on credit sale terms the additional cost in excess of the equivalent cash transaction is readily ascertainable. What possible impediment is there to the imposition of a mandatory disclosure requirement *vis-a-vis* the finance rate for deferred payment dispositions of goods? In this writer's view there are none and it is submitted that retailers should be obliged to disclose such rate in their advertisements and price tickets. In order to avoid the imposition of an undue burden on retailers such finance rate could be required only in respect of goods bearing a price in excess of, say, \$100. While it is undoubtedly true that many loans are not arranged in conjunction with the purchase of goods or made following public advertisements, consumers would be much better informed as to finance rates applicable and attainable in the market and so in approaching a finance company directly, for example, could measure that company's rate as against those rates advertised by various retail outlets. Where a retailer purports to charge a rate in excess of the advertised rate this could be made *prima facie* evidence that the advertisement was deceptive or misleading.<sup>233</sup>

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(233) See the Credit Contracts Act 1981, s 35; and the Crowther Committee Report, para 6.4.13, for their discussion regarding advertisements for non-purchase money loans.

The scheme outlined, it is submitted, would greatly bolster 'shopping for credit' in the area of goods and services, in particular, and put the consumer in a better bargaining position; that is, he could point out to a particular retailer that while the cash price for certain goods was the same as that advertised by a competitor, the retailer had less favourable credit terms. Better informed consumers make for a more competitive credit market and for this reason alone the above approach, it is submitted, merits attention.

Disclosure of financial particulars obviously lies at the heart of the mandatory disclosure scheme in the Credit Contracts Act 1981 for entirely obvious and desirable reasons. It must, however, be recognised that such disclosure has attendant disadvantages. First, excessive emphasis on financial particulars may be misleading in that a consumer's attention may be diverted from other highly relevant considerations. For example, while one creditor may be offering goods for sale on credit terms that are marginally lower than those of a competitor, the latter creditor may be offering a longer or better guarantee, or a better after sales service. Furthermore, in times of high inflation a longer term loan at a higher effective finance rate may be a more attractive proposition than a short term loan at a lower finance rate. Second, it is also contended that competition among financiers to reduce the stated finance rate will often be false competition and that deceptive

practices will develop. For example, the cash price of goods could be artificially inflated to make the finance rate appear more favourable. While it is undoubtedly true that where the seller himself extends credit there is some scope for him to bury some of the total cost of credit in his cash price, this is not a significant problem - a comparison of the cash prices asked for a particular commodity will reveal an obvious deception occasioned by an inflated cash price, and in any competitive market a retailer who inflates his cash price will prejudice his cash sales even if this device does assist in the promotion of deferred payment dispositions. Third, disclosure is not achieved without cost. Complexities of rate computation and compliance with disclosure provisions in general can create substantial administrative burdens leading to additional costs which inevitably would be passed on, thus increasing rather than reducing the level of credit charges. Therefore, rate disclosure for all its advantages does have drawbacks.

Finally, in assessing the effectiveness and value of disclosure legislation, it is important to see it in its proper context. Accurate market information is useful only to those who have the power and ability to choose. While disclosure legislation will assist middle and upper income earners to take advantage of competitive market conditions, market information will not have much impact on low-income earners who have few real alternatives

from which to choose. In the case of a low income earner disclosure will in most cases be ineffective in relation to any form of credit for his credit standing will normally be so low that he will be obliged to take whatever credit he can get and on whatever terms. In addition, the ability to choose will determine the usefulness, or otherwise, of disclosure. To many prospective debtors the important thing is the ability to make the required periodic payments rather than concern about the cost of credit or the finance rate. General lack of knowledge on the part of consumers is a problem that pervades the whole area of consumer protection, and there are undoubted benefits that will flow from consumer education in this field. However as the Contracts and Commercial Law Reform Committee emphasise 'credit education is a long term solution',<sup>234</sup> and the Credit Contracts Act 1981 goes a long way towards ensuring that a consumer is given the tools for making a more effective comparison between one form or source of credit and another, even if not all consumers are yet in a position to utilise these tools.

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(234) Credit Contracts Report, para 9.12.

## 2. PACKAGING AND LABELLING

### (1) INTRODUCTION

In a sense packaging and labelling is simply another manifestation of advertising in that goods will be packaged and/or labelled in such a way as to appeal to consumers and thereby promote sales; this being so, this topic may have been subsumed under the previous chapter heading. However, for purposes of this thesis this topic has been isolated for separate treatment as there is a basic difference in function between advertising, on the one hand, and packaging and labelling, on the other. While advertising is primarily directed at the promotion of sales with the consequence that the informational content is subordinated, and secondary to, this function, labelling has as its main objective the transmission of information as to identity, quantity, quality, composition, safety and use.<sup>235</sup>

The Molony Committee proposed that informative labelling should be actively pursued in accordance with the philosophy that if all relevant information about a class of

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(235) As DiPrima, 'Advertising of OTC Drugs: Proposed TRR Warnings', (1977) 32 Food Drug Cosmetic Law Journal, 96, 97 explains

"A consumer needs to know how to use a product, and how not to, at the time he wants to use it. If the information accompanies the product, then the information is there when he needs it. He expects advertising to be commercially partial and has the right to expect it to be truthful. But when he wants to use the product, and wants to find out how, even a naive consumer does not think he is supposed to turn on the television to catch a commercial or drive in the country to find a billboard".

goods is available to a prudent consumer then a prudent shopping decision is possible; that is, information must be annexed to goods so as to assist the consumer to judge for himself whether or not they will satisfy his particular requirements.<sup>236</sup> Furthermore informative labelling also assists consumers after a product has been purchased if there are instructions as to care and use, and labelling of certain goods is essential to warn consumers of potential hazards associated with consumption or use.

The laws that regulate the packaging and labelling of goods may be traced back to the earliest times<sup>237</sup> and today regulation in this area is found in a forbidding mass of subsidiary legislation as well as in a number of important Acts of Parliament. Regulation in this area is designed to ensure (i) that certain information is contained on packages or labels, and (ii) that the goods are not packaged or labelled in a way that misleads. It is proposed in this part to concentrate on the former objective and to identify and deal with the various types or categories of information that must be disclosed on packaging or on labels.

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(236) Consumer Protection: Final Report, (HMSO 1962, Cmnd 1781), para 48.

(237) See Harvey, The Law of Consumer Protection and Fair Trading (1978), 1-6.

(2) TYPES OF INFORMATION(a) Identity

Questions of relevance here are: Who made the goods? What are they called? Where were they made?

The Consumer Information Act 1969 stipulates that 'all packagers of goods shall cause the packages to bear a label showing the name and address of the packager or the person on whose behalf the goods were packaged'.<sup>238</sup> Provision also is made for the mandatory disclosure of 'the name by which the goods are commonly known or if there is no such name, the generic name or other appropriate descriptive term',<sup>239</sup> but to date no regulation has been promulgated in this regard. Neither the Food Act 1981 nor the Medicines Act 1981 contain provisions requiring the disclosure of the name and address of the manufacturer on the package, container or label of a food, medicine or medical device, but provision is made in both of these Acts for regulations to be drafted to achieve this object.<sup>240</sup> The Food and Drugs Regulations 1973<sup>241</sup> enacted pursuant to the now repealed Food and Drug Act 1969, provided that a

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(238) S 3(1). No such disclosure is required where the package is too small to accommodate the information, nor where the packaged goods are sold by retail from the premises on which they were packaged. See ss 3(3), 3(8) respectively.

(239) S 5(2).

(240) See Food Act 1981, s 42; Medicines Act 1981, s 105.

(241) As amended by Regulations 1974/188; 1976/68; 1978/41; 1979/207; 1980/73; 1980/265.



manufacturer had to state on a package containing food or drugs his name and address<sup>242</sup> and a regulation to this effect will undoubtedly be promulgated under the new legislation in this area. The Food and Drug Regulations 1973 also stipulated that every package containing food should bear a label containing the common name of the food or a description of the food containing the common names of the principal ingredients<sup>243</sup> and it is reasonable to assume that this provision will be reproduced in any regulation made pursuant to the Food Act 1981. As regards animal remedies and pesticides, these products may only be sold under labels containing the name and address of the licensee or proprietor, respectively.<sup>244</sup> Furthermore, an animal remedy may only be sold under a label that gives the name of the remedy as entered in the licence under which the remedy is manufactured or imported<sup>245</sup> and the label to any container of pesticide must give the name and proprietary brand of the pesticide.<sup>246</sup> The aforementioned provisions ensure that the consumer has an address to which he may complain, and endeavour to reduce the risk of confusion or mistake by stipulating for "common" or "brand" names to appear on labels.

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(242) See Reg 5(1)(c).

(243) See Reg 5(1)(a).

(244) See Animal Remedies Act 1967, s 36(1)(b); Pesticides Act 1979, s 38(1)(a).

(245) Animal Remedies Act 1967, s 36(1)(a).

(246) Pesticides Act 1979, s 38(1)(a).

Provision is also made for disclosure of the origin of manufactured goods in that the Merchandise Marks Act 1954 empowers the Governor General, by Order in Council, to direct that goods bear such an indication of origin.<sup>247</sup> Orders have been made pursuant to this Act requiring that clothing, footwear and dry cell batteries indicate their country of origin and any such product may not be sold or exposed for sale in New Zealand unless such indication appears on the product concerned.<sup>248</sup> Provision is also made in the Food Act 1981 for packages containing food to be branded, stamped or marked so as to indicate the fact of their importation and the country of origin,<sup>249</sup> and the Medicines Act 1981 similarly would authorise the imposition of conditions as to disclosure of origin.<sup>250</sup> The validity and usefulness of such mandatory disclosure may be questioned on the grounds that it constitutes an obstacle to trade and that it is an unreliable indicator of quality and properties of products. The Molony Committee recommended that mandatory disclosure of the origin of manufactured goods should be abolished for these reasons and suggested that consumers would benefit from the increased competition where foreign goods were sold under no disadvantage.<sup>251</sup> In accordance with the

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(247) See ss 3, 4, 5.

(248) See Footwear Marking Order 1955; Clothing Marking Order 1956; Dry Cell Batteries Marking Order 1957.

(249) S 42(1)(Q).

(250) S 105(1)(d).

(251) Consumer Protection: Final Report, op. cit., pages 232-233.

Molony Committee recommendation, the Trade Descriptions Act 1968 no longer required imported goods to bear indications of origin, but in 1972 this requirement was re-introduced on the ground that the origin of a product is frequently as significant as its weight or composition in influencing consumer choice.<sup>252</sup> This may be true, but the real issue is whether this information is desirable from an economic perspective. It may be argued that disclosure of origin will promote consumption of home produced footwear and clothing, for example, and that because this stimulates local industry such disclosure should be mandatory; conversely, consumers may opt for imported footwear or clothing thinking it to be of better quality. If this latter assumption is correct then obviously no harm will be done as a rational choice has been made (albeit for irrational reasons), but if incorrect, then origin marking will have an anti-competitive effect in promoting the sale of inferior merchandise.

(b) Quantity

Since earliest times the law has concerned itself with the weight and quantity of goods being sold.<sup>253</sup> This concern is manifest in the number and variety of statutory

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(252) See Trade Description Act 1972 (UK), s 4(2); Cranston, Consumers and the Law (1978), 286.

(253) Harvey, op. cit., 2-3. For example, the Assize of Bread and Ale of 1266 laid down a scheme to control the amount of bread or ale obtainable for a farthing or penny respectively. Short weight or quantity was punishable by a fine or, in more serious cases, flogging or the pillory.

provisions concerning themselves with this matter today. While basic information as to quantity and weight is of considerable importance to the consumer it is evident from the legislation covering this area that simple directions to the effect that the quantity or weight must be displayed on packages, labels or the goods themselves is inadequate. Two reasons account for this:

i) With packages or containers of greatly varying size and content, it becomes very difficult for a consumer to make a rational choice. Thus he is confronted with one brand of a product which is in a 2.2 kilogram package at price 'x' and another brand in a 2.5 kilogram package for more than price 'x'. The consumer is faced with a fairly complex calculation in order to determine the best quantity/price ratio and in a supermarket environment, for example, he may not have the time, inclination or even ability to work out the 'best buy'.<sup>254</sup>

ii) Where a variety of measures is used accurate comparison is possible only where the conversion rate is known. For example, where the weight of one brand is expressed in ounces and the competing brand's weight is given in grams.

For these reasons the New Zealand Legislature has recognised that something more than mandatory disclosure

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(254) See Trebilcock, 'Consumer Protection in the Affluent Society', (1970) 16 McGill Law Journal 263, 286.

of weight and quantity alone is required; there must be *uniformity* in expression of weights and measures and *standardisation* in packaging is required.

The Weights and Measures Act 1925 is an appropriate starting point in this area. This Act provides for standards of measurement which are the basis upon which weights and measures may be verified, limits the denominations of weights and measures which may be used and stipulates the measures appropriate in certain circumstances.<sup>255</sup> This Act, and regulations made pursuant to the Act, provide, *inter alia*, that -

i) No person shall sell, offer or expose for sale by retail by weight or measure any goods enclosed in a package unless the net weight or measure of the goods is legibly printed on the outside of the package or upon a label that is attached to the package.<sup>256</sup> Where the goods are weighed and measured in the presence of the customer this provision does not apply.

ii) Goods sold by retail by weight or measure may only be sold by net weight or measure<sup>257</sup> and the marking of such net weight or measure on any article must be in

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(255) Weights and Measures Act 1925, ss 5, 6; Weights and Measures Amendment Act 1976, s 3; Weights and Measures Amendment Act 1977, s 2; Weights and Measures Amendment Act 1980, s 2.

(256) Weights and Measures Act 1925, s 18(3).

(257) Ibid, s 18(1).

accordance with the Weights and Measures Regulations 1926-1951.<sup>258</sup> By virtue of the Metrication (Retail Trading) Regulations 1978 weights and measures of the metric system are obligatory in retail sales by weight and measure, and any person who uses any other weight or measure in packaging goods for sale by retail or in selling goods by retail, is liable on summary conviction to a fine of up to \$500.<sup>259</sup>

iii) The denominations in which goods can be packaged or sold by retail are restricted. The Metrication (Retail Trading) Regulations 1978<sup>260</sup> provide that goods specified in the schedule to the regulations must be disposed of in standard metric packages. For example, butter may only be enclosed in 250g and 500g packages, and sugar must be disposed of in 250g, 500g or multiples of 500g packages.<sup>261</sup> Similarly the Weights and Measures

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(258) Reg 3 provides that: '(a) Where an article is solid, semi-liquid or partly solid and partly liquid...such marking shall be expressed in terms of weight, and not otherwise: (b) Where an article is liquid, such marking shall be expressed in terms of liquid measure: (c) Where an article is commonly sold by lineal or superficial measure, such marking shall be expressed in terms of such measure'.

(259) See Reg 2.

(260) As amended by the Metrication (Retail Trading) Regulations 1978, Amendment No. 2; SR 1980/126.

(261) Other articles for which standardised metric packages are prescribed are chocolate powder, cocoa and cocoa powder, coffee, dairy spreads, golden syrup and treacle, haricot beans, honey, lentils, lima beans, margarine, milk, mustard, pastas, peanuts, pepper, rice in bags, sago, salt in bags, soup mix, cereals, split peas, tapioca, tea, nails, paints, tobacco and turpentine.

Regulations 1926-1951<sup>262</sup> provide for the disposition of firewood, coke and coal in standardised quantities<sup>263</sup> and for the disposal of bread according to specified weights.<sup>264</sup>

The Weights and Measures Act 1925, and the Regulations made pursuant to it, go a long way towards facilitating rational choice. The standardisation of packages assists the consumer in making quantity/price comparisons between competing brands and the mandatory disclosure of quantity in metric terms alone means that the consumer is not faced with difficult conversion calculations. The only negative feature associated with standardisation of packaging is that this may involve the manufacturer in additional cost which in turn will be passed on to the consumer.

The Consumer Information Act 1969 provides that the Minister of Trade and Industry may by notice in the *Gazette* require that packages of certain goods bear a label showing the quantity of goods in the package.<sup>265</sup> The Minister has exercised this power on two occasions<sup>266</sup>

(262) Amendment No 11; SR 1975/298.

(263) *Ibid*, Reg 5(1).

(264) *Ibid*, Reg 6(1).

(265) S 4.

(266) See Consumer Information (Quantity) Notice 1971; Consumer Information (Quantity) Notice 1973.

and information relating to quantity is demanded in respect of a wide variety of goods.<sup>267</sup> This writer concurs in the view of the Ministerial Working Party reviewing certain Consumer and Commercial Legislation<sup>268</sup> in categorising these notices as 'unnecessarily bureaucratic'. As the Working Party point out, it would be far better if all packaged goods were labelled as to quantity in terms of the Weights and Measures Act 1925 thereby reducing the degree of fragmentation of measures designed to achieve the same object.

The Food Act 1981 and the Medicines Act 1981 empower the Governor General by Order in Council to make regulations providing for detailed quantity information to be incorporated on any package or label.<sup>269</sup> Under the Regulations<sup>270</sup> made pursuant to the now repealed Food and Drugs Act 1969 every package containing a food or drug had

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(267) The weight, volume or fluid measure, as the case may require, of cosmetics and toileteries, deodorants, air fresheners, bleaches, dyes, starches, blues, polishes, window cleaning fluids, insect repellents, abrasive soaps, laundry soap, toilet soap, soap flakes, soap powder, enzyme cleaning preparations, shaving soap, shaving cream, talcum powder, toothpaste, tooth powder, dentifrices, pet food, liquid soap, shampoo and detergent liquids, must be shown on the label of the relevant goods; furthermore the number of preserving jar seals, drinking straws, paper cups, paper plates and paper tissues and paper napkins must be disclosed; finally, the dimensions by length and width of paper tissues and paper napkins, blankets, sheets and greaseproof paper, wrapping foil, wrapping plastic and other food wrapping material must be given.

(268) See Proposals for a Selling Practices Act, (8 July, 1980), p. 14.

(269) See Food Act 1981, s 42(1)(p); Medicines Act 1981, s 105(1)(l).

(270) Food and Drug Regulations 1973.



to bear a label indicating the net weight or volume or number of the contents of the package depending on what measure was most appropriate for the retail sale of the item concerned,<sup>271</sup> and regulations to the like effect may be anticipated under the Food Act 1981 and under the Medicines Act 1981. Finally, as regards agricultural products the net weight and quantity of animal remedies must be displayed on the label of the remedy concerned<sup>272</sup> and pesticides must be labelled similarly.<sup>273</sup>

Even if goods are not pre-packed, weight and quantity may still have to be made known to consumers. The Weights and Measures Act 1925 provides that where any person offers or exposes any goods for sale by retail by weight or measure he shall at the request of the purchaser to whom such goods are sold weigh or measure the goods in the presence of the purchaser and for this purpose must have an accessible and suitable weighing instrument or measure.<sup>274</sup> In accordance with the Metrication (Retail Trading) Regulations 1978, weights and measures of the metric system are obligatory in all retail sales.<sup>275</sup>

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(271) Ibid, Regs 5(1); 238.

(272) See Animal Remedies Act 1967, s 36(1)(g).

(273) See Pesticides Act 1979, s 38(9).

(274) Weights and Measures Amendment Act 1977, s 2; substituting a new section 20 in the principal Act.

(275) Reg 2.

Before leaving this brief appraisal of mandatory disclosure of quantity and weight information it may be noted that where weight is the appropriate means to reflect quantity information the legislature has opted for the disclosure of "net" weight. It has been argued that such disclosure requirement does not take sufficient cognisance of technically unavoidable deviations which are said to occur with even the most sophisticated filling and packaging equipment<sup>276</sup> and that the tendency is to overfill to allow for any variation. While at first sight this may appear to be to the consumer's advantage, on closer reflection, permanent overfill may have an adverse effect on prices. Consequently some legislatures have opted for the disclosure of 'average net weight' to allow for deviations, sometimes without a specification of the tolerances permitted.<sup>277</sup> However it is suggested that it is cold comfort to a consumer to know that his or her short weight is compensated for by another consumer elsewhere receiving an amount in excess of the average net weight. Furthermore, provision is made in New Zealand for certain tolerances; e.g., provision is made for permissible errors in weighing or measuring equipment,<sup>278</sup> and where goods are subject to variation in weight by reason of climatic influences no offence is committed if the package

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(276) OECD, Compulsory Labelling of Prepacked Consumer Goods (1974), 35.

(277) See, for example, the Fair Packaging and Labelling Act, 15 USC (USA).

(278) See the Weights and Measures Regulations 1926-1951, Table 2-15.

bears a conspicuous label showing the net weight when packed.<sup>279</sup> Therefore, on balance, it is submitted that the current regime is perfectly adequate.

(c) Quality and composition

Much mandatory disclosure is directed at the composition of products and this is particularly true of the food and drug area. Holt,<sup>280</sup> in discussing ingredient and nutrient labelling in Australia, comments that

"...legislative policy has reflected a belief that the best way to look after the consumer was to control what goes into certain standard foods rather than leave judgments about the suitability of ingredients to the consumer".

This policy is reflected in New Zealand legislation covering the same ground<sup>281</sup> but the increased level of consumer awareness has made informational labelling a more realistic and desirable supplementary measure today. The modern consumer is better acquainted with nutritional and dietary matters and, therefore, more likely to find compositional disclosure of assistance in facilitating choice between competing products. Furthermore, such disclosure of the composition of products ensures that the consumer is not misled. As a result much legislation is directed to this end.

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(279) Weights and Measures Amendment Act 1968, s 3; substituting a new s 18(4) in the principal Act.

(280) 'Food Packaging and Labelling', in Duggan and Darvall, Consumer Protection Law and Theory (1980), 68.

(281) See for example the voluminous Food and Drug Regulations 1973.

Both the Food Act 1981 and the Medicines Act 1981 empower the promulgation of regulations designed to achieve comprehensive disclosure of the composition of foods or drugs respectively,<sup>282</sup> and the Food and Drug Regulations 1973 made extensive provision for such disclosure. For example; the label on a package containing food for which no standard was prescribed in the regulations had to specify the amounts of the ingredients in the package;<sup>283</sup> no package containing any food could bear a statement as to the presence in that food of any vitamins unless detailed disclosure of those vitamins and the quantity of each vitamin was effected on the package;<sup>284</sup> and, every package containing a therapeutic drug had to bear a label giving the appropriate quantitative particulars of each of the active ingredients.<sup>285</sup> In all likelihood regulations to the same effect will ensure that similar disclosure is required under the Food Act 1981 and the Medicines Act 1981, respectively. Provision is also made in the Consumer Information Act 1969 for the disclosure of particulars as to the content of any goods as may be specified in any regulation,<sup>286</sup> but to date no such regulation has been promulgated.

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(282) See Food Act 1981, s 42(j) to (m); Medicines Act 1981, s 105(h), (l).

(283) Food and Drug Regulations 1973, Reg 6, as amended by Reg 3 of 1976/68.

(284) Food and Drug Regulations 1973, Reg 13, as amended by Reg 6 of 1974/188, and Reg 6 of 1976/68.

(285) Food and Drug Regulations 1973, Reg 239.

(286) S 5(1); s5(2)(b), (c).

As regards the agricultural sector, the Pesticides Act 1979, the Animal Remedies Act 1967 and the Wool Labelling Act 1949 contain provisions designed to compel compositional disclosure. The Pesticides Board may direct that the label attached to any pesticide registered under the Act should contain particulars of the chemical composition of the pesticide,<sup>287</sup> and a similar power is attributed to the Animal Remedies Board; that is, an animal remedy may only be sold under a label containing such particulars of the physical, chemical or biochemical composition of the remedy as the Board may require.<sup>288</sup> Recognition of the vital role which wool plays in the New Zealand economy was instrumental in ensuring that special legislation was enacted to provide for the labelling and marking of wool. The Wool Labelling Act 1949 provides *inter alia*, that any wool product<sup>289</sup> must be labelled as such and indicate the percentage by weight of wool in the product.<sup>290</sup> Only if such a wool product contains one hundred per cent by weight of wool<sup>291</sup> may it be described as being 'all wool' or 'pure wool' or be similarly described.<sup>292</sup> The Ministerial Working Party reviewing

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(287) Pesticides Act 1979, s 38(1)(c).

(288) Animal Remedies Act 1967, s 36(1)(d).

(289) See the definition of "wool product" in section 2; note, that a product which contains less than fifty per cent by weight of wool is not a "wool product".

(290) S 3(1).

(291) See, however, the Wool Labelling Amendment Act 1969, s 2, inserting a new subsection 6(A) into section 3 of the principal Act.

(292) Wool Labelling Act 1949, s 3(6).

certain Consumer and Commercial legislation, while recognising that wool enjoys a special position and that there was a need to 'avoid other fibres and fibre suppliers "piggy backing" on the market premium achieved by wool',<sup>293</sup> recommended that the concept of the Wool Labelling Act 1949 should extend to all textile products where fibre content claims are made. However, no disclosure of content should be required for woollen or any other textile products, in the opinion of the Working Party, where the seller refrains from making a fibre content claim.<sup>294</sup> Only where such a claim is made must the claim be truthful and complete and in the case of a product that is described as being a mixture, then the percentage by weight of the predominant fibre should be given.<sup>295</sup> The Working Party do not favour mandatory disclosure of fibre content in all cases as they consider that the increased costs associated with such mandatory disclosure would outweigh the perceived benefits of maximising consumer information.<sup>296</sup> This may or may not be true. However the following observations are advanced: (i) The Working Party's conclusion in this regard is open to some doubt given the *laissez-faire* attitude that pervades the whole Report;

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(293) Proposals for a Selling Practices Act, 8 July 1980, page 15.

(294) Ibid, page 16.

(295) Idem.

(296) Ibid, page 15.

(ii) The pre-eminence of wool and extraordinary reputation that it enjoys is in no small measure attributable to the clear identification of the product by the use of proprietary trade names such as the "Woolmark"; given this reputation most woollen products will continue to be labelled as such, but it is only through mandatory disclosure that consumers will be educated as to suitable alternatives to woollen products. Why not a 'rayon-mark' or 'polyester-mark' for such synthetic fibres? By clearly identifying products competition is stimulated in that rational choice as opposed to random selection becomes possible, and repeat purchases may be based on experience with a particular fabric or fibre; (iii) Provided a reasonable tolerance is allowed for variations in processing, expenses associated with testing for individual fibre content and maintaining that exact content may be significantly reduced; (iv) Proposals suggesting less, rather than more, information run counter to prevailing trends in most Western countries and must be viewed with some caution. Therefore, unless it is clearly demonstrated on a cost-benefit basis that mandatory labelling of all textiles as to content would be prohibitively expensive, it is submitted that such a policy be implemented.<sup>297</sup>

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(297) The United States, Canada, Australia and all EEC countries compel fibre content labelling for all textiles. See Textile Fiber Products Identification Act, 15 USC s 70(b) (USA); Textile Labelling Act 1970 (Canada); Textile Products Labelling Act 1954-70 (NSW); Directive on Textile Labelling, 26 August 1971, O.J. 1971 L 185/16. This EEC directive provides that the names of fibres must be specified on a fabric or in any advertisements for the same, together with the percentage of the different fibres used.

Date-marking on packaged goods provides consumers with an important piece of information that enables them to assess, before purchase, the likely quality and storage life of goods. This is particularly true of perishable foodstuffs but is by no means limited in application to this arena. The Consumer Information Act 1969,<sup>298</sup> the Food Act 1981,<sup>299</sup> the Medicines Act 1981,<sup>300</sup> the Animal Remedies Act 1967<sup>301</sup> and the Pesticides Act 1979<sup>302</sup> all contain provisions that would authorise compulsory date-marking. The two basic alternative methods of expressing the date are embodied in the date-marking provision of the Consumer Information Act 1969; that is, the Governor General may prescribe by regulation that goods be marked with 'the date on which they were packaged or the date before which the goods should be used to ensure maximum use or effectiveness'.<sup>303</sup> Holt<sup>304</sup> suggests that the approach to be endorsed is largely a matter of personal preference, although the nature of the product may dictate that one approach is to be preferred over the other. Proponents in favour of 'expiry dating' claim that it is most appropriate in the case of short-life goods, for

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(298) S 5(2)(g).

(299) S 42(1)(m).

(300) S 105(1)(l).

(301) S 36(1)(k).

(302) S 38(1)(i).

(303) S 5(2)(g).

(304) Op. cit., 66.



example, and that consumers who have little or no knowledge of the durable life of foods and other perishable packaged goods are not greatly assisted by 'commencement dating'. Conversely, proponents in favour of 'commencement dating' point to the reliability and certainty of such a date and the fact that it is not dependent upon a manufacturer's subjective calculations, based on optimum storage conditions, of his product's life span.<sup>305</sup> Both approaches have been adopted in New Zealand. For example; every package of corned, cured, pickled or salted meat intended for retail sale had to be labelled with the date on which the package was filled<sup>306</sup> and butter sold in hermetically sealed containers had to be labelled with the year and month of the year in which the butter was manufactured.<sup>307</sup> Conversely, yoghurt had to be labelled or embossed with the date until which the product would retain, without any deterioration, its quality<sup>308</sup> and a biochemical animal remedy must be labelled with the date until which the remedy may reasonably be expected to retain its potency.<sup>309</sup> Finally, Regulation 243 of the Food and Drug Regulations 1973 is illustrative of a provision requiring the disclosure of both dates; that is, as regards biochemical preparations such as vaccines and anti-biotics, the date of manufacture and the date after

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(305) Ibid, 67.

(306) Food and Drug Regulations 1973, Reg 86(5).

(307) Ibid, Reg 131(4); see also the Meat Regulations 1969, Reg 174, which requires all cans of meat to be marked to indicate the date on which the meat was canned.

(308) Ibid, Reg 139.

(309) Animal Remedies Act 1967, s 36(1)(k)(ii).

which the preparation should no longer be used had to be given.<sup>310</sup> Whichever approach is preferred it is clear that information of this type is of considerable use to a consumer.

But date marking is not a complete answer to the problem of stale food, for example, as it amounts to no more than an indication of "freshness". Unless products are kept under appropriate storage conditions at all stages between manufacture and consumption 'their optimum life will be curtailed and consequently the date mark could become positively misleading'.<sup>311</sup> For this reason numerous provisions are directed at ensuring that storage facilities and the mode of storage of products is adequate<sup>312</sup> and the usefulness of date marking is contingent upon compliance with storage requirements.

Grading is yet another means whereby information about the quality of goods may be conveyed to the consumer. While the advantages of compositional labelling should not be underestimated it must be appreciated that information must be in a form that renders it intelligible to the average consumer. As Trebilcock<sup>313</sup> remarks

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(310) Food and Drug Regulations 1973, Reg 243(2)(d).

(311) Holt, op. cit., 66.

(312) Refer to the Food and Drug Regulations 1973. For Example, see Regulations 28, 32, 37, 85, 103 and 187.

(313) 'Consumer Protection in the Affluent Society', (1970) 16 McGill Law Journal 263, 287.

"To tell the average consumer that X toothpaste contains 'hexo-chlorophene for whiter teeth' (and four other named components), or that Y soap powder contains 'bio-enzymes' (and other components) 'for a cleaner wash' tells him nothing".

Grading is a possible solution to this difficulty; that is, goods may be graded according to their nutritional value in the case of foodstuffs and in accordance with their efficacy in the case of soaps, detergents, drugs, and so on.<sup>314</sup> Compulsory grade labelling is therefore a useful way of indicating quality where consumers appreciate the difference between goods of different grades. About thirty fruits and vegetables, eggs and wine are subject to grading regulations in the Common Market<sup>315</sup> and, in New Zealand, eggs,<sup>316</sup> fruit and vegetables,<sup>317</sup> and poultry have been subjected to grading requirements. For example; no eggs may be sold which have not been graded for quality and size in accordance with the Poultry Board Regulations 1980 and these regulations make provision for four grades of size;<sup>318</sup> similarly, the New Zealand Grown Fruit and Vegetables Regulations 1975 empower the Director-General of Agriculture and Fisheries to determine grade standards for any fruit or vegetable, and any such fruit or vegetable for which a standard grade is determined and which

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(314) See Trebilcock, ibid, 287-288.

(315) See Cranston, op. cit., 282.

(316) See the Poultry Board Regulations 1980, Regs 22-24.

(317) See the New Zealand Grown Fruit and Vegetables Regulations 1975, Regs 13-15.

(318) Reg 23.

is in a package which bears a standard grade mark must conform to the specifications of that grade.<sup>319</sup>

However, it is submitted, that compulsory grade marking amounts to no more than an appealing idea with very limited scope. While grades may be established for natural products such as fruit and vegetables, how is one to establish grades for complex and composite consumer lines, such as video cassette recorders, etc? Even in relation to a basic commodity such as a breakfast cereal, medical and nutrition experts may disagree as to what is the most nutritious combination of vitamins, etc.<sup>320</sup> Not only is objective measurement and determination of grades a forlorn hope, but the expense involved in administering an "across-the-board" grading system would be prohibitive. If these factors are not sufficient deterrent then mention might also be made of the fact that grading is of little use unless the consumer appreciates the difference between the goods of different grades. A grading system will only reveal some difference in quality but not the nature of the difference.<sup>321</sup>

Finally, on the question of quality and compositional information on packages or labels, reference must be made to quality marking. Designmarks may be awarded by the New Zealand Industrial Design Council to New Zealand made products that measure up to the standard of excellence required.<sup>322</sup> Before a designmark is awarded the product

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(319) Reg ss 13, 14.

(320) See Trebilcock, op. cit., 288.

(321) Idem.

(322) See the Industrial Design Act 1966.

must have at least fifty per cent New Zealand content, must meet all the appropriate New Zealand standards, and workmanship must be of a high calibre. Furthermore, the product must be good value for money and must be safe and reliable.<sup>323</sup> If these criteria are met then the designmark may be awarded and products bearing this mark are obviously of an extremely high quality. In its early years of operation the Industrial Design Council encouraged companies with their products already in the marketplace to apply for a designmark, but this emphasis changed in 1980. Now, prototypes can be evaluated and the manufacturer may be advised of requisite changes or modifications to ensure that the final product will be eligible for a designmark. Products displaying the designmark are becoming increasingly evident in the marketplace and this mark carries connotations of good quality.<sup>324</sup>

Quality assurance also may be conveyed when a product is marked as complying with a New Zealand Standard, or better still, when it carries a Standard Certification Mark; that is, a manufacturer may claim compliance with a New Zealand Standard by marking his product with the relevant New Zealand Standard number, but to acquire the independent guarantee of product quality represented by the Standard

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(323) Ibid, s 15; see also 'The Press', 16 September 1981, for an article based on an interview with Mr. David Hamilton, the Christchurch based field adviser for the Industrial Design Council.

(324) See 'The Press', 16 September 1981.

Certification Mark, the manufacturers own quality control procedures are inspected, or established, by the Standards Association Certification section staff.<sup>325</sup> Numerous consumer products are covered by standards and the information that a product is made to a New Zealand Standard, especially if supported by the Standard Certification Mark,<sup>326</sup> assures the consumer that essential technical requirements are met and he can then select the design, colour and price that suits his own needs.

(d) Safety and Use

A large body of law relating to packaging and labelling is directed at forewarning the consumer as to the potentially harmful nature of the goods concerned or of the hazards associated with, or allied to, their use. For example:

i) Regulations made pursuant to the Dangerous Goods Act 1974<sup>327</sup> require that containers of dangerous goods be marked with either their technical or trade name and the nature of any hazard (e.g. flammable liquid, spontaneously combustible, poison gas). Manufacturers are obliged to place warning symbols on hazardous products and in the case of flammable products additional marking is required.<sup>328</sup> For example, an aerosol container must bear a label reading 'keep in cool place away from heat. Do not puncture or throw in fire even when empty', and where the contents of such an

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(325) See the Standards Act 1965, ss 23-25.

(326) 'S' Mark.

(327) S 35; see the Dangerous Goods (Labelling) Regulations 1978.

(328) See the Schedules to the Regulations.

aerosol are flammable, there is the additional requirement that a clear marking to this effect be marked on the container.<sup>329</sup>

ii) Two recent interventions have been aimed primarily at the welfare and safety of children. The Safety of Children's Night Clothes Act 1977 directs that certain instructions and warnings should be affixed to garments.<sup>330</sup> For example, certain garments must bear the words 'designed to reduce fire risk, keep away from fire',<sup>331</sup> and instructions as to the cleaning of certain garments must be given so as to avoid a reduction in the fire resistant qualities of the garment concerned.<sup>332</sup> Another provision designed specifically for the protection of children is contained in the Plastic Wrapping Regulations 1979.<sup>333</sup> These regulations require that a suitable warning be printed on certain types of plastic bags that point to the danger of children being suffocated if the bags are drawn over their faces.<sup>334</sup> The Explanatory Note

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(329) Dangerous Goods (Labelling) Regulations 1978, Reg 9.

(330) See s 5; "Garment" is defined in section 2(1) as meaning 'a pair of pyjamas, an over-garment of pyjama style, a nightdress, or a dressing gown, which under Standard Specification for Children's Nightclothes Having Low Fire Risk (NZS 8705), is suitable for children aged 12 months to 14 years inclusive'.

(331) Safety of Children's Nightclothes Act 1977, s 5(a).

(332) Ibid, s 5(c).

(333) Enacted pursuant to the Health Act 1956, s 119.

(334) Reg 2.

to the regulations observes that these regulations differ from their predecessors<sup>335</sup> in that bags that are of sufficient stiffness to avoid the clinging properties that present the principal hazard are exempt from compliance with this warning directive.

iii) Voluminous regulations, entitled the Poisons Regulations 1964, have been promulgated pursuant to the Restricted Drugs Act 1960<sup>336</sup> and detailed provisions are set out for the labelling of poisonous goods sold at wholesale, at retail, and by medical practitioners, pharmacists and dentists. There are also elaborate rules specifying the data to be placed on such sundry but potentially hazardous items such as hair dyes, aerosols or antihistamines. For example, containers of antihistamines must bear a label warning of the dangers of driving within six to eight hours after taking such a drug, and a warning directing pregnant women not to use the drug without medical direction must also be incorporated on the label.<sup>337</sup> For numerous substances it is not sufficient to simply warn against improper use or consumption, the label must contain a statement indicating the appropriate first aid treatment to be followed in the event of a poisoning.<sup>338</sup>

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(335) Viz.; the Plastic Wrapping Regulations 1960, the Plastic Wrapping Regulations, Amendment No. 1.

(336) The Restricted Drugs Amendment Act 1979, s 2(1), gives this title to the Act previously known as the Poisons Act 1960. This legislation eventually will be replaced by the Toxic Substances Act 1979.

(337) Poisons Regulations 1964, Reg 50.

(338) Ibid, Reg 39.



iv) The Food Act 1981 and the Medicines Act 1981 empower the promulgation of regulations designed to warn consumers about potential hazards associated with the consumption and/or use of food or drugs respectively.<sup>339</sup> The Food and Drug Regulations 1973, enacted pursuant to the now repealed Food and Drug Act 1969, contained numerous provisions to this effect; for example, no infant's food that did not conform in approximate proportion to the composition of human milk and that was recommended for use as the main food for infants had to bear a warning label to the effect that the food should not be given to infants under 4 months of age except under skilled supervision;<sup>340</sup> furthermore, any medicine containing more than a certain proportion of ethyl alcohol had to be labelled with a statement declaring the presence, and percentage, of alcohol.<sup>341</sup> In the area of food and drugs, reference also could be made to the Meat Regulations 1969;<sup>342</sup> for example, containers of pet food must bear a statement that the contents are not suitable for human consumption.<sup>343</sup>

The illustrations above bear adequate testimony to the extensive nature of the legislature's concern for consumer safety *vis-a-vis* the consumption and use of certain

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(339) Food Act 1981, s 42; Medicines Act 1981, s 105.

(340) Food and Drug Regulations 1973, Reg 236.

(341) Ibid, Reg 242.

(342) Enacted pursuant to the Meat Act 1964.

(343) Meat Regulations 1969, Reg 159.

hazardous goods. Furthermore, mention might be made of the fact that the government and the tobacco industry have entered into a voluntary agreement that health hazard warnings must appear on cigarette packets and in poster and press advertisements, and must be such that they can be easily seen by consumers.

Finally, some consideration must be given to 'use marking'. What provision is made in statutes for use marking is primarily directed at safety considerations (e.g. keep out of the reach of children; do not drive a vehicle within 6 hours of consuming this drug) but some provision is made for more general "use" disclosure. For example, the Consumer Information Act 1969 authorises the Governor General to make regulations aimed at compelling the disclosure of particulars relating to the application or use of any goods.<sup>344</sup> Similarly, the width of the discretion afforded under the Food Act 1981 and the Medicines Act 1981 for the promulgation of regulations would cover regulations designed to achieve "use" disclosure.<sup>345</sup> Finally, the Pesticides Act 1979 and the Animal Remedies Act 1967 authorise the respective administrative Boards to stipulate that directions for the use of any pesticide or animal remedy be displayed on the products' label.<sup>346</sup> However much use marking is of a voluntary nature and this is particularly true of "care"

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(344) Consumer Information Act 1969, s 5(2)(e).

(345) See the Food Act 1981, s 42; the Medicines Act 1981, s 105.

(346) See the Pesticides Act 1979, s 38(1)(e); the Animal Remedies Act 1967, s 36(1)(f).

labelling by the textile industry; that is, many goods are labelled to inform consumers of what cleaning process or processes are most appropriate and desirable for the fabric concerned. This is advantageous in two respects, in that (i) this prevents/alleviates consumer dissatisfaction by prolonging the lifespan of the product, and (ii) there is a reduction in the wastage of economic resources.<sup>347</sup> In some countries, notably the United States of America,<sup>348</sup> care labelling is mandatory, but whether this is a desirable state of affairs is debatable. As Cranston<sup>349</sup> observes

"The objection to compulsory care labelling has been mainly that the variety of factors determining how textiles respond to treatment is too great - and includes behaviour solely within the province of consumers - for manufacturers to be threatened with criminal sanctions".

Therefore, while manufacturers ought to be encouraged to incorporate more general "use" information on labels, cautious evaluation must be undertaken before such disclosure is compelled. Not only is there the danger that general "use" information will obscure more pertinent information, such as safety statements, but the costs associated with such disclosure may outweigh the estimated benefit. Detailed "use" disclosure, not directed at safety considerations, must be subordinated to information that does pertain to identity, quantity and safety.

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(347) OECD, Labelling and Comparative Testing (1972), 19-20.

(348) See Cranston, op. cit. 287.

(349) Idem.

### (3) PRESENTATION

The brief discussion above on the types of disclosure conveys an idea of the myriad of statutory provisions and regulations that provide for mandatory disclosure of information on packages or labels. As an essential complementary measure, and in an endeavour to ensure the effectiveness of this disclosure, most statutes and subordinate legislation contain provisions directed at (a) the mode of disclosure, and (b) the accuracy and honesty of disclosure. It is proposed in this part to consider briefly these two elements.

#### (a) The Mode of Disclosure

"Detail" is the word that most appropriately summarizes the legislature's response to regulating the mode of disclosure. It is not proposed to consider all the provisions designed to regulate the mode of disclosure on packages and labels, as this would be a well nigh impossible task, but to identify the thrust of these requirements. In this writer's opinion two basic objectives may be isolated: (i) To ensure the availability and presence of the required information at the time of sale; and (ii) To ensure that the required information is readily discernible.

As regards the first objective, labels must be firmly attached, and must be of a nature or material that will not fade or become defaced. For example the Poisons Regulations 1964 provide, *inter alia*, that labels must be firmly affixed and be of such a nature and material that

they 'will not fade or become detached by the influence of light, of atmospheric humidity or dryness, or of normal atmospheric temperatures'.<sup>350</sup> Furthermore, any marking or label must be so positioned so as to prevent it being destroyed or defaced when the package is opened for inspection by a prospective purchaser,<sup>351</sup> and the label must be made of sufficiently durable material to withstand handling damage.<sup>352</sup> These, and analogous provisions, are designed to ensure that the information is available at the time of sale and that the host of provisions relating to informational content are not rendered nugatory through the absence, or defacement, of any label.

As regards the second objective, the information must be readily discernible. To this end, provisions regulate the height, shape and comparative size of lettering, stipulate that the information must be conspicuous and be prominently displayed, and must not be obscured. For example, the Safety of Children's Night Clothes Act 1977 stipulates that a required marking must be in easily legible lettering of not less than 3 millimetres<sup>353</sup>

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(350) Reg. 36.

(351) See, for example, the Consumer Information Act 1969, s 6(2)(d); the Poisons Regulations 1960, reg. 36(e); the Animal Remedies Act 1967, s 36(9)(e).

(352) See, for example, the Consumer Information Act 1969, s 6(2)(k); the Poisons Regulations 1960, reg. 36(d).

(353) S 6(1)(c).

and must not be accompanied by or combined with any other matter tending to contradict or obscure the required marking.<sup>354</sup> Furthermore, markings or other information must be affixed to such parts of a container or package so that the information may be readily examined by prospective purchasers<sup>355</sup> and in the case of certain goods there must be compliance in terms of the size of lettering, layout and colour.<sup>356</sup> Such provisions ensure the prominence of the requisite information and endeavour to prevent the possibility of salient information being obscured in a mass of trivia.

(b) The Accuracy and Honesty of Disclosure

Generally speaking, no package or container must bear, or have attached to it, any false or misleading statement, word, brand, picture, mark or label.<sup>357</sup> For example, in *Wark (Inspector of Health) v New Zealand*

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(354) S 6(3).

(355) For example, see the Weights and Measures Regulations 1926-51, Part VI, reg. 9; the Food and Drug Regulations 1973, reg. 9; the Consumer Information Act 1969, s 6(2)(e); the Footwear Marking Order 1955, reg. 4; the Clothing Marking Order 1956, reg. 4 and the Schedule.

(356) See, for example, the Dangerous Goods (Labelling) Regulations, 1978, reg. 6; the Plastic Wrapping Regulations 1979, reg. 2; Poisons Regulations 1964, reg. 37.

(357) See, for example, the Consumer Information Act 1969, ss 6, 7; the Food Act 1981, s 10; the Medicines Act 1981, s 61; the Pesticides Act 1979, s 38(10); the Animal Remedies Act 1967, s 36(4); the Wool Labelling Act 1949, s 4(1)(c); the Merchandise Marks Act 1954, s 9; the Dangerous Goods Act 1974, s 29.

*Products Ltd*<sup>358</sup> section 6(3) of the then Food and Drug Act 1947 fell to be considered. This subsection provided that it was an offence to sell

"a food or drug in any package which bears or has attached thereto any false or misleading statement, word, brand, label or mark". 359

The defendant manufactured tinned foods, which according to the label contained "Baked beans in tomato sauce with bacon". However, it was established that the proportion of bacon in the tins was infinitesimal and Astley S.M. remarked that there was "(n)o taste of bacon in the mixture such as would be experienced by the ordinary person whose mind was not directed to an effort to find that taste".<sup>360</sup>

Applying the test laid down in *Concentrated Foods Ltd v Champ*<sup>361</sup> the learned magistrate concluded that while the words may be literally true, in that the mixture did contain some bacon, it was misleading to an average consumer to describe such a mixture as being "with bacon".

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(358) (1953-55) 8 MCD 23.

(359) See the analogous provision in the Food Act 1981, s 10(1).

(360) *Supra*, at 25.

(361) [1944] 1 KB 342, 350. Wrottesley J held that "The test is: What does the ordinary person understand by the language? Is he misled?" See also *Burch & Co Ltd v Hughes* [1950] NZLR 423, 426 per Smith J.

As with the provisions designed to control misleading and deceptive advertisements<sup>362</sup> the approaches adopted in the different statutes vary. For example, any person who sells any food that bears a misleading label is liable on conviction to a term of imprisonment not exceeding 3 months or a fine not exceeding \$3000 if the offence was committed knowingly, or to a fine of up to \$1000 in any other case;<sup>363</sup> this is a strict liability offence and there is accordingly no necessity for the prosecution to prove *mens rea*.<sup>364</sup> The Merchandise Marks Act 1954 represents something of a compromise in that the normal onus of proof is reversed; that is, a person who has, for example, applied a false trade description to goods may escape a prison term of up to two years, or a fine of \$1000, or both, by negating an intention to defraud.<sup>365</sup> Such a person must prove either (i) that he acted innocently; or, (ii) that he took all reasonable precautions to ensure compliance and that on demand from the prosecutor he assisted by giving all information in his power to trace the person(s) from whom he obtained the goods.<sup>366</sup> At the other end of the spectrum, the

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(362) See Chapter IV, Statutory Control of Advertising, supra.

(363) Food Act 1981, s 10(2).

(364) Ibid, s 30; see also the Medicines Act 1981, ss 80, 82; Pesticides Act 1979, s 38(10); Dangerous Goods Act 1974.

(365) Merchandise Marks Act 1954, s 9(1).

(366) Merchandise Marks Act 1954, s 9(2).



Consumer Information Act 1969 embraces the philosophy that any prosecution for an infringement of the packaging and labelling provisions in that Act, is to be a measure of last resort, and that the normal procedure will be consultation and negotiation between the offender and the Examiner of Trade Practices or his representative.<sup>367</sup> To date, no such prosecution has been embarked upon.

The provisions outlined in this cursory appraisal of "Presentation" are designed to ensure the conspicuous presence of accurate information about any goods for which mandatory disclosure exists, and are an essential corollary to the substantive disclosure provisions.

#### (4) CONCLUSIONS

It is submitted that, generally speaking, the laws relating to packaging and labelling make provision for the adequate transmission of information as to identity, quantity, quality, composition, safety and use. More specifically, the following points may be made:

i) These laws provide for the adequate identification of goods in that the risk of confusion is minimised by rules requiring the disclosure of the "common" names of certain goods where the consumer may be misled by some

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(367) Consumer Information Act 1969, s 19.

technical name or obscure brand name.<sup>368</sup>

ii) Disclosure of the origin of goods is of a more doubtful nature and value in that, while this may stimulate domestic consumption, it is an unreliable indicator of quality and may reduce competition.

iii) As regards disclosure of quantity, the legislature has recognised that the disclosure of this information, without more, is reduced greatly in impact. Quantity information must go hand in hand with standardisation of package and container sizes so that comparison as between competing brands is facilitated. Furthermore, the required use of metric weights and measurements in the retail trade obviates difficulties in conversion; for example, as where one brand's weight is expressed in pounds and ounces and the competing brand's weight is expressed in kilograms and grams. The promulgation of Quantity notices<sup>369</sup> pursuant to the Consumer Information Act 1969 is an instance of needless fragmentation in that all requirements relating to weights and measures may be promulgated pursuant to the Weights and Measures Act 1925 and be incorporated in the regulations to that Act.<sup>370</sup> Finally, on the question of quantity disclosure, it is

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(368) Supra.

(369) Consumer Information (Quantity) Notice 1971;  
Consumer Information (Quantity) Notice 1973.

(370) Viz., the Weights and Measures Regulations 1926-1951.

submitted that the New Zealand legislature's adoption of "net" weight disclosure is the most appropriate means of communicating this information; obviously disclosure of "gross" weight is of lesser merit because the consumer is purchasing the contents of a package or container and could be misled by an unduly heavy container or package, and disclosure of "average" weight means that some consumers will benefit at the expense of others.

iv) While recognising that compositional disclosure may be meaningless where the components of a good are complicated, the value of such disclosure must not be underestimated. Just as it may be a mistake to assume a high level of sophistication and intelligence on the part of the average consumer, so it would be a mistake to assume that the average consumer lacks the capacity to benefit from such disclosure. While today's consumer is not necessarily a backroom pharmacist he is, in this writer's opinion, much more aware of compositional matters (such as the presence or absence of additives, preservatives and vitamins) than he is given credit for.

v) In relation to clothing, fabrics and other such materials there is a case to consider for the disclosure of content for all textile products, and not to confine such disclosure to woollen products. Consistent disclosure of fibre content may enhance competition and educate consumers who will acquire a familiarity with the range of natural and synthetic fibres employed in the textile industry.

vi) Datemarking is to be recommended as the consumer is given an indication of the age and/or storage life of the product concerned and it is strongly recommended that such marking be extended to all perishable goods.

vi) Grading, it is submitted, is too expensive and impracticable to implement on a large scale, although it is readily conceded that where consumers understand the significance of each grade, and the distinction between such grades, then grade marking is a useful way to convey quality information. But the chances of extensive across-the-board grading must be very slender.

viii) Safety marking is undoubtedly of paramount importance and it is therefore appropriate that considerable emphasis is placed on such disclosure in the various statutes and subordinate legislation.

In summary, it is submitted that the law relating to packaging and labelling is in a satisfactory state from the consumers' perspective. He is given, subject to minor reservations, adequate information, detailed rules ensure that this information is given accurately and honestly, and from this writer's observations over the past four years there is substantial compliance with packaging and labelling laws. From the point of view of the manufacturer the position may be less desirable in that there is no cohesive packaging and labelling law, and compliance in respect of any particular good may necessitate reference to a multitude of diverse regulations that are not the most accessible nor easily located rules.

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### 3. OTHER MANDATORY DISCLOSURE MEASURES

Legislative concern for consumer information has manifested itself in areas aside from those discussed above. In this part it is proposed to highlight a further two major measures.

#### (1) DIRECT SELLING

"Direct" or "in-house" selling describes the practice of selling goods and services otherwise than at appropriate trade premises.<sup>371</sup> This practice is sometimes described as 'door to door selling' but this description is too limited as it takes no account of more sophisticated and diverse techniques; that is, door to door selling appropriately describes 'cold canvassing' which is the practice of random door knocking employed by many companies who sell in the home, but many companies have adopted the so-called "party" or "home show" method whereby goods and/or services are demonstrated to a number of consumers at the same time. Therefore, a more accurate term embracing these selling techniques would be 'direct selling or in-house selling'.<sup>372</sup>

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(371) The expression 'appropriate trade premises' is employed in the Door to Door Sales Act 1967.

(372) See du Fresne, 'Both Feet in the Door', 'The Listener', 5 January 1980, at page 10.

Direct selling had its origins in the United States of America towards the end of the nineteenth century and made its first appearance in New Zealand during the 1920's. Karl du Fresne reports<sup>373</sup>

"Electrolux, the Swedish vacuum cleaner company, began selling door to door here in 1924. The Rawleighs man, with his quaintly labelled medicines and toilet-tries, has been calling on New Zealand housewives since 1931, and Christchurch based Bon Brushes took to the road in 1935."

Since that time there has been a rapid escalation in the number of firms engaged in direct selling, and in the volume of sales effected using this technique. Tupperware NZ Ltd have an annual turnover in excess of \$10 million and the Avon cosmetic company have, by employing direct selling techniques, captured a big percentage of the New Zealand cosmetics market in an extraordinarily short time - at the expense of the local pharmacist's business in cosmetics.<sup>374</sup>

The Legislature has sought to regulate direct selling by enacting the Door to Door Sales Act 1967,<sup>375</sup> which endeavours to protect housewives and other persons who decide to buy goods or services on credit, or to hire such

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(373) Idem.

(374) Ibid, at 12. See also *Consumer* 192, 37 where it is reported that Electrolux's share of the vacuum cleaner market is some 45 percent, despite the fact that nearly all its selling is done door-to-door.

(375) As amended by the Door to Door Sales Amendment Act 1973.

goods or services, where the agreement is made other than at appropriate trade premises. Control in the area of direct selling is desirable for a number of reasons;<sup>376</sup> namely -

- (i) Direct selling employs elements of psychological advantage and *fait accompli* that may negate the possibility of the consumer making a rational choice. As Malcolm Cubitt of the New Zealand Chemists Guild is reported<sup>377</sup> as saying

"Direct selling techniques are well thought out. Once they get inside the house, sit down and lay their products on the table, they're virtually assured of a sale. To say no, the customer has to get them to pack all their products up again and show them the door. A lot of people just aren't used to that sort of hustling."

Similarly, with 'party plan' direct selling the party-goer may be psychologically pre-disposed to buy especially where the prospective customer has been invited by a friend.

- (ii) Prospective customers are deprived of the advantage and opportunity of making an informed purchasing decision based on knowledge concerning comparable goods and services.

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(376) For some of the extensive literature on the topic see: Moore, 'Australian Regulation of Deceptive Selling Practices', (1972) 4 Adelaide Law Review 423; Duggan, 'The Cooling-Off Period in Victorian Door to Door Sales Legislation', (1973) 8 Melbourne University Law Review 134; Wilson, 'Consumer Protection at the Front Door', (1976) 12 University of Western Australia Law Review 557.

(377) See du Fresne's article, at page 12; footnote 372, supra.



(iii) High-pressure salesmanship can do irreparable harm to other participants in the direct sales market.<sup>378</sup>

(iv) Frauds may be perpetrated on householders by unscrupulous salespersons.

The Door to Door Sales Act 1967 is directed at sales of goods or services on credit<sup>379</sup> and at hiring agreements under which goods are disposed of on terms which entitle the hirer to apply the instalments in reduction of the purchase price and to ultimately retain the goods as his own.<sup>380</sup> The Act does not apply to cash sales, nor does it apply to credit sale agreements for small amounts<sup>381</sup> and, most importantly, the Act does not apply if the transaction takes place at appropriate trade premises, which are defined in the Schedule to the Door to Door

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(378) Concern about the doubtful direct selling practices employed by some sellers has led some of the main companies involved to form a Direct Sellers Association, which aims at ridding the industry of its tarnished image. See du Fresne, *op. cit.*, 11. However, not all sellers belong to this Association, nor do all the members necessarily 'practice what they preach'. See *Consumer* 192, 36. Therefore, statutory controls must supplement any voluntary controls.

(379) Including hire purchase agreements; see s 2(1).

(380) See s 2(1) and the definition of 'hiring agreement'; see also *Walsh v Industrial Acceptance Corp'n* [1936] SR (Qd) 275.

(381) For example, the Act does not apply to credit sale agreements in respect of books where the purchase price does not exceed \$20; nor does it apply to other credit sale agreements where the purchase price does not exceed \$40: see s 2(1).

Sales Amendment Act 1973.<sup>382</sup> Finally, the Act does not apply where 'the first enquiry specifically relating to the sale and purchase of the goods that are the subject of the agreement is made by the purchaser'.<sup>383</sup> Section 11(2) stipulates that in determining who made the first enquiry any solicitation by a vendor in an advertisement addressed to the public at large or any section of the community must be ignored. Flitton<sup>384</sup> observes that this provision

"... (i)s designed to cull out the sale resulting from a deliberate request for a home demonstration. To exclude all sales where the purchaser has made the first enquiry is not sufficient. This has been demonstrated in the United States, where radio advertisements promise 'a television set in your living room today if you call this number'. This is the clearest appeal to impulse buying and will be followed by the 'hard sell' in the home later in the day."

Having briefly outlined the scope of the Door to Door Sales Act 1967, the mechanics of the consumer protection measures contained in that Act fall to be considered. Section 7 states that where a purchaser has acquired goods, or entered into an agreement for the provision of

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(382) See also s 5; Flitton, Legislation Note, (1968) 3 NZULR 86 comments that the applicability of the Act to transactions made otherwise than at 'appropriate trade premises' may lead to complications in that the 'result may be the necessary application of the Act to unanticipated but legitimate business forums'.

(383) S 11(1).

(384) Legislation Note, (1968) 3 NZULR 86, 87.

services on credit, that purchaser is to be given a seven-day period of reflection. If during that period, he or she elects not to continue with the agreement, then it may be cancelled; it is totally irrelevant that the agreement was negotiated fairly and honestly and that 'hard sell' techniques were not employed. As Lawson<sup>385</sup> points out 'the consumer is given the right to annul an otherwise entirely valid contract'.

In an endeavour to ensure the efficacy of this provision the legislature has (i) provided that all attempts to contract out of the Act's provisions are ineffective,<sup>386</sup> and (ii) stipulated that notice be given to the purchaser of his right to cancel.<sup>387</sup> If the consumer is unaware of his right to cancel the legislation will be worthless. Consequently, the Act provides that no door to door sale is enforceable unless the agreement is in writing and is signed by all the parties concerned; the agreement must contain a conspicuous statement advising the purchaser of his legal right to cancel the agreement and this must be accompanied by a prescribed cancellation form.<sup>388</sup> Failure to notify the purchaser of

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(385) 'Protection of the Consumer in New Zealand - Some Recent Developments', (1973) 5 Otago University Law Review 49, 53.

(386) S 12.

(387) S 6; note that the disclosure provisions under the Credit Contracts Act 1981 do not apply; see the Credit Contracts Act 1981, s 15(1)(f).

(388) Ss 5, 6 and the Schedules to the Act.

his right to cancel results in the period of cancellation being extended to one month.<sup>389</sup> The agreement does not automatically become binding upon the expiration of the one month period as the vendor can only enforce the contract once he has given the customer full particulars of the contract and his right to cancel, coupled with a cancellation form; the purchaser then has seven days to cancel after the lapse of which period the vendor has an enforceable contract.<sup>390</sup>

The right to cancel, coupled with a notice drawing the customer's attention to this right, represents a major improvement for consumers who are pressurized into unwanted credit agreements by direct selling techniques. However, less scrupulous direct selling concerns can nullify the impact of this legislation by not providing any notice of cancellation entitlement,<sup>391</sup> and in the majority of cases the consumer will complete his instalment payments in respect of unwanted

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(389). S 7(3).

(390) See s 8; Flitton, *op. cit.*, 89 argues that '(u)nder section 7(3) the seller could ignore section 6, inform the purchaser that as with all other contracts, he has no right to cancel, wait a month, and have an enforceable contract'. This assertion ignores the effect of section 8 although I would concur in the view of that writer that the drafting leaves a lot to be desired.

(391) *Consumer* 193, 80 reports that Starlite Studios order forms (for photographs taken by travelling salesmen) include a clause 'Notice to Customer: Right to Cancellation' but the cancellation clause did not stay with customers; once the order was made the form was taken away.

goods or services in total ignorance of his rights. Only where the consumer reneges in respect of these payments, or seeks legal advice, will the true legal position be revealed. Consequently one is forced to concede that consumer education is the ultimate solution and counter to sharp practices but at least compliance with the law by the majority of honest direct sellers will further public awareness of legal rights in this area<sup>392</sup> - whether or not there will be disclosure in every case is, of course, a separate issue.

## (2) MOTOR VEHICLE SALES

In 1975 the Motor Vehicle Dealers Act was passed by Parliament and the Minister of Justice when introducing the Bill to Parliament said:

"It makes better provision for the licensing and disciplining of motor vehicle dealers and their staff and reforms the law relating to contracts for the sale of motor vehicles by dealers in order to promote and protect the interest of the consumer."<sup>393</sup>

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(392) Trebilcock, 'Consumer Protection in the Affluent Society', (1970) 16 McGill Law Journal 263, 293 observes that the Ontario Consumer Protection Act 1966 confers a right of cancellation on a consumer in respect of door to door sales but does not require that notice of this right be given. Therefore, he asserts '(t)his piece of legislation no doubt satisfies the honour of door-to-door salesmen while doing minimal damage to their pockets'.

(393) See *Hansard*, Vol 402, at p. 5153.

As with other jurisdictions,<sup>394</sup> widespread discontent with the second hand car industry prompted this legislation and it is interesting to note that considerable pressure for the legislation emanated from within the industry itself.<sup>395</sup> In drafting the legislation extensive consultation with the Motor Trade Association, the Motor Vehicle Dealers Association, the Consumers' Institute, the Motor Vehicle Manufacturers Association and the Finance Houses Association was undertaken. The main features of this legislation, in very general terms, are as follows:

(i) The Act sets up a comprehensive licensing system operated by the Motor Vehicle Dealers Licensing Board<sup>396</sup> with the object of ensuring that only suitable persons

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(394) See, for example, Goldring and Maher, Consumer Protection in Australia (1979), 163.

(395) See *Hansard*, Vol. 402, p. 5160. The actions of unethical dealers may reflect badly on the whole used car market to the detriment of reputable traders; therefore it is not surprising that the latter group should press for better controls as it is in their economic interest.

(396) The Magistrate's Court was the original licensing authority but the Motor Vehicle Dealers Amendment Act 1979 transferred this responsibility to the Board; this change was envisaged in 1975 as the Minister of Justice, when introducing the original Bill, said he considered registration by a specialised body, rather than the Courts, as an emerging trend in occupational licensing. See *Hansard*, Vol. 395, p. 5472.

in sound financial positions should be licensed;<sup>397</sup> it is an offence to carry on the business of a motor vehicle dealer without the requisite licence.<sup>398</sup>

(ii) A second aspect of the Act is the setting up of a Motor Vehicle Dealers Institute to which all licensees must belong. The Institute is empowered to make rules for a wide range of purposes; e.g., to prescribe payments by members to the Institute, to impose penalties on members, and to prescribe a code of ethics for regulating the services that members give to the public.<sup>399</sup>

(iii) The Act establishes a Fidelity Guarantee Fund to be administered by a Council comprising members of the Institute and a barrister or solicitor of the High Court.<sup>400</sup> All motor vehicle dealers must contribute to this fund,<sup>401</sup> and monies may be paid out of the fund to reimburse consumers who have suffered loss by reason of dishonoured cheques or breaches by a licensee of any warranty implied under the Motor Vehicle Dealers Act 1975 or under the Sale of Goods Act 1908, and to compensate

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(397) See ss 8, 11; cf. the Motor Vehicle Dealers Act 1958 which also erected a licensing scheme but the criteria to be satisfied for the award of a licence were less demanding.

(398) See s 7.

(399) See Part II of the Act.

(400) S 33.

(401) S 35.

for any failure to carry out repair obligations.<sup>402</sup>

(iv) A number of provisions are directed at consumer warranties<sup>403</sup> and a Disputes Tribunal is set up to deal with the enforcement of these warranties.<sup>404</sup>

(v) A Motor Vehicle Dealers Disciplinary Committee is established under the auspices of the Institute to deal with complaints against licensees.<sup>405</sup>

Most important for purposes of this thesis is that certain relevant information must be given to prospective purchasers of vehicles being offered for sale by any motor vehicle dealer.<sup>406</sup> No secondhand motor vehicle may be offered or displayed for sale unless a clear and legible notice in prescribed form<sup>407</sup> containing the particulars specified in section 90(2) is attached to the vehicle. This notice, which must be displayed in a prominent position and which must be capable of being read from a reasonable distance,<sup>408</sup> must set out

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(402) S 39. Note that the examples given are by no means exhaustive. Since its inception on April 1, 1976, the Fidelity Guarantee Fund has greatly assisted consumers. As at April 1, 1980, 96 claims had been met and paid pursuant to the provisions of section 39 of the Act for a sum total of approximately \$200,000.

(403) See Part VII of the Act; for example, a term as to title is implied into every contract for the sale of a motor vehicle (s 89).

(404) See ss 96-108.

(405) See ss 119-122.

(406) See ss 90-95.

(407) See the Motor Vehicle Dealers Regulations 1980 and Form 21 set out in the Second Schedule to those Regulations.

(408) Idem; and see s 90(5) of the Act.



information such as the dealers name and business address, the cash price of the vehicle, the year in which the vehicle was first registered, the registration number of the vehicle and the category of the car with the dealer's warranty in respect of that category.<sup>409</sup>

Furthermore, the fact that a vehicle has been or is used as a taxi or rental-car must be revealed<sup>410</sup> as this may have considerable bearing on a correct estimation of its market value,<sup>411</sup> and if the car is being sold by "tender", is "ex-overseas" or has been rebuilt or repossessed this must also be disclosed in the notice and in these cases it must be stated that "no warranty" is given.<sup>412</sup> Some flexibility is introduced into the above rules in that a licensee may offer a category C motor vehicle<sup>413</sup> for sale with "no warranty", provided: (i) the prescribed notice draws this fact to a purchaser's attention;

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(409) Motor Vehicle Dealers Act 1975, s 90(2); second-hand motor vehicles are divided into 4 categories (A-D) and the dealer is liable to make good any "defects" in any vehicle falling in category A-C so that it is in a reasonable condition having regard to its age and the distance it has travelled. See the Motor Vehicle Dealers Act 1975, ss 92-93.

(410) Motor Vehicle Dealers Act 1975, s 90(2).

(411) See, for example, *Capital Motors Ltd v Beecham* [1975] 1 NZLR 576.

(412) Motor Vehicle Dealers Act 1975, s 90(3).

(413) A 'category C' motor vehicle is defined in section 92 as 'a secondhand motor vehicle, not being a category A or category B motor vehicle, that was first registered not more than 8 years ago and that has driven not more than 100,000 kilometers'.

(ii) the purchaser is given a reasonable opportunity to take the vehicle to an independent person, such as the Automobile Association, for evaluation; (iii) the purchaser signs a statutory declaration in the prescribed form<sup>414</sup> that he understands he is waiving his rights; and (iv) he signs and receives a copy of the notice that drew his attention to the "no warranty" provision.<sup>415</sup> Furthermore, where a licensee attaches a notice in prescribed form setting out with reasonable particularity each defect that he believes to exist in respect of any category A-C vehicle together with his own estimation of the reasonable cost of rectifying that defect, the obligation of the licensee to make good any defects is extinguished as regards those defects drawn to the purchaser's attention.<sup>416</sup>

If the vehicle is substantially different from the vehicle as represented in the notice attached to it, the Motor Vehicle Disputes Tribunal is empowered to rescind the contract or order that compensation be paid by the dealer;<sup>417</sup> if the latter remedy is granted recourse

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(414) See Motor Vehicle Dealers Regulations 1980 and the form set out in the Second Schedule to those regulations.

(415) Motor Vehicles Dealers Act 1975, s 94.

(416) *Ibid*, s 95, Note, however; (i) that where the true reasonable cost of repairing a vehicle exceeds that estimated by the licensee the purchaser may recover the difference from the licensee; (ii) that disclosure of defects with 'reasonable particularity' is no easy task in the case of secondhand cars for as Trebilcock, *op. cit.*, 292 remarks '... where does wear and tear stop, and where do defects start?'.

(417) Motor Vehicle Dealers Act 1975, s 101.

may be had to the Fidelity Fund in the event of the dealer not making restitution.<sup>418</sup>

Given the importance of the motor vehicle industry in modern society, the hazards associated with the purchase of secondhand cars and the volume of complaints in this area, the Motor Vehicle Dealers Act 1975 represents a significant move to improve the operations of a particular industry. As has been stressed elsewhere in this thesis, knowledge by consumers of the full nature, price and quality of goods and services is a pre-condition for workable competition. The disclosure provisions in this legislation ensure that a prospective purchaser is given sufficient information to make a rational decision and the vendor is encouraged to draw the purchasers attention to any defects if he wishes to escape liability in respect of their repair.<sup>419</sup> Provided a purchaser can

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(418) Ibid, s 39(e).

(419) Goldring and Maher, op. cit., 175, comment that provision for optional defect disclosure by dealers is of dubious assistance as many purchasers will be disinclined to purchase a vehicle that is demonstrably defective; therefore dealers with knowledge of defects may as an exercise in merchandising judgment decide not to reveal defects, relying on the defect not manifesting itself within the guarantee period. 'Rather than place a premium on silence, the legislation should compel full disclosure of such circumstances'. It is respectfully submitted that while this argument has considerable merit, mandatory disclosure of defects is undesirable because: (i) what is a defect in respect of a used car? It is a matter of opinion as to where defects begin and normal wear and tear ends; (ii) such disclosure would obscure other information; and (iii) the statutory warranties under the Act are generous in nature.

resist sales pressure and is not abysmally gullible, the information as revealed in the statutory notice should improve his bargaining position.<sup>420</sup>

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(420) For example, the prospective purchaser appraised of the fact that a car is an 'ex-rental car' could argue strongly for a price reduction on the basis of doubtful treatment at the hands of numerous drivers.

#### 4. OTHER SOURCES OF INFORMATION

Various consumer organisations perform a vital role in advising and informing consumers about the merits and de merits of various goods and services offered for sale or hire in New Zealand. For example:

##### (1) THE CONSUMER COUNCIL AND THE CONSUMERS' INSTITUTE

The Consumer Council and Consumers' Institute were first established in 1959 and were under the administrative control of the Department of Trade and Industry, but were reconstituted as an independent body under the Consumer Council Act 1966.

The Council's functions are

"to protect and promote the interests of consumers of goods and services by whatever lawful means appear to it expedient, and by so doing to encourage the improvement and development of industry and commerce". 421

The Council consists of 12 persons appointed on their personal qualifications by an Appointments Committee and do not represent any organisation, and 3 ex officio members who represent the Departments of Trade and Industry, Health, and Scientific and Industrial Research.<sup>422</sup> The Council itself is primarily a policy-making body and most of the Council's functions are carried out by the Consumers' Institute.<sup>423</sup>

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(421) Consumer Council Act 1966, s 16.

(422) Ibid, s 5.

(423) Ibid, ss 14-22.

In carrying out the functions mentioned the Consumers' Institute covers a full range of consumer protection activities, including the following:

(i) Comparative performance testing. The Institute, like its counterparts in Australia<sup>424</sup> and the United Kingdom,<sup>425</sup> for example, tests and reports on the quality, price and construction of goods and services in order to facilitate rational choice and to prevent possible harm through health and safety defects. While the goods and services that are tested are chosen generally from those most widely used by consumers or upon which consumers spend large sums of money,<sup>426</sup> priority is accorded to testing those goods and services that may affect the safety of consumers.<sup>427</sup> Tests are carried out by the Institute's own laboratory, or by independent specialised laboratories and authorities, and results are published in *Consumer*.<sup>428</sup> Results are not published until the manufacturer, importer or supplier of the product or service concerned has had a reasonable opportunity to comment, and full details of the tests conducted are supplied.<sup>429</sup>

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(424) Australian Consumers Association.

(425) British Consumers Association.

(426) See the 'Fifteenth Annual Report and Statement of Accounts' of the Consumer Council for the twelve months ended 31 December 1978, p 5. [Hereinafter referred to as the Consumer Council Report 1978.]

(427) *Idem*.

(428) *Consumer* is published by the Consumer Council and issued 11 times a year pursuant to section 17(d) of the Consumer Council Act 1966.

(429) Consumer Council Report 1978, 5.

This service of the Consumers' Institute is particularly valuable in that consumers are provided with objective information in a readily understandable form and, consequently, are placed in a position to distinguish between competing brands of substantially similar products or services. Given that product differentiation sustains oligopoly and diminishes competition<sup>430</sup> comparative performance testing plays a vital role in counteracting this segmentation of the market. The only limitation to the effectiveness of this service is that the information is not all that accessible; that is, the estimated readership of *Consumer* in 1978 was 409,000<sup>431</sup> and as one Australian writer<sup>432</sup> puts it -

"It seems clear that if the assembly of product data is to have any significant impact it must, at least in the case of expensive items, be provided at point of sale so that the consumer's search costs are reduced to a minimum."

While the cogency of this argument cannot be rebutted with respect to cheap goods and services where the projected saving doesn't warrant consultation of independent product information sources, the argument is less tenable with respect to major consumer goods and services, and

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(430) See Chapter I, Introduction, supra.

(431) Consumer Council Report 1978, 10. This readership is diminishing as membership numbers decline.

(432) Duggan, 'The Great Soap Opera', (1978) 11 Melbourne University Law Review 467, 499.

where unsafe products are involved the Consumers' Institute in New Zealand releases warnings about those products to the news media, thus obviating any delay in publication and reaching a much wider audience.<sup>433</sup> Furthermore, the Consumers' Institute's contribution to radio and television programmes<sup>434</sup> serve to expand the range and number of recipients of information about goods and services.

(ii) Consumer Education. Publications such as *Consumer* make for a much better informed and discriminating public and various specialist publications,<sup>435</sup> which the Institute produces from time to time, considerably assist the consumer. However, it is perhaps the Consumers' Institute's promotion and discussion of consumer affairs at primary and secondary school level that holds the greatest potential for the future. *Teaching Notes* are available on a wide range of topics<sup>436</sup> and education officers are available to discuss consumer rights and responsibilities. Furthermore, the Institute arranges numerous seminars and discussion sessions with adult groups and organisations.

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(434) For example, Television New Zealand's 'Fair Go' programme, and Radio New Zealand's 'Counter Measure' programme.

(435) For example, *Buying or Building a House*; *Consumer in Law*; *Buying a Used Car*; *Cosmetic care for your skin*.

(436) For example, *Teaching Notes* No 95/96 deals with 'Advertising in New Zealand'.



*Consumer* itself, in addition to carrying test results of various products, contains a wide variety of informative articles. For example, in 1978, articles on appliance advertising, food labelling, minors' contracts, bankcards and on challenging high prices emphasised particular areas of consumer concern.

(iii) Complaints Advisory Service. Complaints Advisory Officers in Auckland, Wellington, Christchurch and Dunedin assist without charge in an advisory and mediatory capacity with consumer complaints. During 1978 over 19,000 complaints were received and in accordance with the Consumers' Institute's policy the vast majority of complainants whose complaints were considered justified were given sufficient advice on how to settle their own claims (64.3 percent). With respect to 8.2 percent of complaints suitable redress was obtained with the assistance of the Institute, and a further 5.2 percent of complaints were referred to other bodies such as the Department of Trade and Industry which has formal powers to investigate such matters as controlled prices. The complaints advisory service offered by the Consumer Council is now operating in conjunction with the Citizens' Advice Bureaux network.<sup>437</sup> Consequently complaints advice is available through some 40 bureaux in addition to the

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(437) See below.

Institute's complaints advisory offices. In addition, the Institute provides 'training and back up assistance to each participating bureau, including the provision of a training module and reference manual'.<sup>438</sup>

In addition to these vitally important informative functions the Consumer Council and Consumers' Institute research into and advise on legislative, financial and welfare matters;<sup>439</sup> are represented on various Parliamentary Committees and public inquiries, and liaise with business, trade and safety organisations.<sup>440</sup> It is therefore not surprising that this independent body has earned high praise and considerable potential exists for additional use to be made of this organisation.<sup>441</sup>

## (2) THE CITIZENS ADVICE BUREAUX

There are Citizens Advice Bureaux in most cities and towns in New Zealand that are staffed by groups of volunteers who have been trained to listen and help sort out problems. One Citizens Advice Bureau describes its prime objective as follows

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(438) Consumer Council Report 1978, 9.

(439) For example, see Proposed Recommendations for Securities Regulations (1980), 12.1.2.

(440) For example, the Standards Association; the Accident Compensation Commission.

(441) See Chapter VI, Conclusion, infra.

"We offer friendly, free, and confidential service to anyone needing help or advice on any problem. If we can't help with your problem we will find someone else who can. We may be able to assist with enquiries about:

Housing, property, and land; family and personal matters; marriage; accommodation and evictions; Social Security and health, consumer questions; financial and budgeting; legal matters." 442

For example, in the year ending 30 September 1980 the Christchurch Citizens Advice Bureau dealt with 15,381 enquiries. The largest category of enquiries related to consumer, trade and manufacture issues, followed closely by tenancy and accommodation matters.<sup>443</sup>

Many citizens Advice Bureaux operate in conjunction with Legal Referral Centres that are staffed by solicitors who attend on a voluntary, unpaid basis, and act as a referral service for people who consider that they may have a legal problem.<sup>444</sup> The solicitor on duty at one of these centres will advise whether the matter ought to be referred to a solicitor, or in the event of the problem being uncomplicated, may give on-the-spot advice.

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(442) Quoted in McBride, The New Zealand Civil Rights Handbook (1980), 101-102.

(443) 'News Advertiser', 28 October 1980.

(444) McBride, op. cit., 102.

As mentioned above, the Citizens Advice Bureaux now work in close collaboration with the Consumers' Institute and many of their staff benefit from training courses and seminars run by the Institute.<sup>445</sup> This free and readily accessible service provided by the Citizens Advice Bureaux is a commendable attempt to redress inadequacies in consumer information; amongst other things, consumers are advised of their legal rights under contracts for the sale of goods and services and associated credit transactions and may be directed to organisations (such as trade associations) or the small claims tribunal in order that their complaints may be speedily and cheaply resolved. As mentioned earlier,<sup>446</sup> ignorance of legal rights and available relief renders the most benevolent legal doctrines superfluous and any measures designed to combat this problem are to be welcomed.

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(445) 'News Advertiser', op. cit. The Consumers Institute, for example, held a South Island Regional Seminar for CAB interviewers on October 4, 1980.

(446) See Chapter III, Private Law Remedies, supra.

## VI CONCLUSION<sup>1</sup>

### (1) THE NEED FOR BETTER INFORMED CONSUMERS

As a general rule<sup>2</sup> promotion of competition is a desirable objective for any consumer protection legislation due to the recognised benefits deriving from competitive pressures. Where impersonal market forces dictate the behaviour of manufacturers and sellers 'workable competition'<sup>3</sup> exists in a market and consumers are able to influence factors such as the price, quantity and quality of goods and services as well as general business practice by casting their 'dollar votes'.<sup>4</sup> The attainment of workable competition is in no small measure dependent upon the existence of adequately informed consumers as it is these persons who are equipped to make a rational assessment as to the respective merits of competing alternatives. In the absence of adequate knowledge about competing goods, services or credit sources, a choice must of necessity be predicated upon

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- (1) It is not proposed in this final chapter to reiterate all the points made in the conclusions to the preceding chapters or parts, but to draw together some particular threads and themes of general significance in the area of advertising and disclosure of information relating to goods, services and associated credit.
  - (2) Economies of large scale production may be conducive to lower costs of production and, consequently, lower prices to the consumer; therefore concentration may be better than unrestrained competition in some areas.
  - (3) Supra, page 35.
  - (4) Supra, page 4.

random selection or impulse. A serious misallocation of resources may result in that the producer of an inferior product, for example, may derive the benefit of its sale, and the consumer has not made the optimum choice having regard to that product's price and quality. While it is undeniably true that the producer of a superior product has a considerable incentive to inform the public of his product's advantages through advertising this message is often obscured in the morass of competing claims couched in laudatory terms. The consumer may well opt for a product that is the most heavily advertised, though not necessarily the best value for money, and when this occurs competition in advertising has displaced competition in respect of price and quality. Therefore, it is in the interests of consumers and the producers of a superior product that consumers are better informed as to the nature and quality of competing goods on the market; more advertising alone is not the answer, but more informative advertising may well promote a more discerning consumer body.

It is also clear that a better informed consumer may safeguard his own interests. For example, in the field of consumer credit it is recognised that paucity of information is one of the main causes of abuse<sup>5</sup> and inadequate knowledge about competing goods and services

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(5) See the discussion, supra, at pages 365, 424.

perpetuates undesirable business practices such as unwarranted product and price differentiation.<sup>6</sup> A better informed consumer is in a position to 'shop for credit' and is less likely to be manipulated into buying a more expensive product for which specious claims of uniqueness have been made. Furthermore, it is necessary that information about rights and remedies and means of redress is disseminated. A consumer who is ignorant of his substantive rights will not know whether he has a complaint sustainable at law and the absence of information pertaining to low cost forums for the resolution of disputes may inhibit any action even where substantive rights are known.

In advocating the need for better informed consumers three factors must be born in mind. *First*, it must be recognised that the interests of consumers generally is not going to be advanced by modelling consumer protection laws on the basis of the maxim *lex procurator fatuorum est*<sup>7</sup> as the costs associated with the implementation of an excessively protective regime may outweigh the benefits. For example, a requirement that advertisers disclose an enormously detailed array of information in their advertisements for goods, services and credit so as to counter informational deficiencies will increase the costs

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(6) Supra, page 16.

(7) See Atiyah, 'Consumer Protection - Time To Take Stock', (1979) 1 Liverpool Law Review 20, 44.

of advertising greatly, and these costs inevitably will be passed on to the consumer body in general. Therefore, caution must be exercised lest the cost of the cure exceed the proposed benefit and informational disclosure must be designed to assist the consumer of average intelligence and comprehension in order that he be placed in a position to best evaluate his appropriate course of action. It is submitted that to require advertisers to have regard to the most gullible members of society in framing their advertising claims is an undue and unnecessary imposition upon advertisers and that this would not be in the interests of the general body of consumers who would ultimately bear the burden of the advertisers additional research and precautionary costs.<sup>8</sup> *Second*, 'consumers will only search out and utilize information so long as the costs of their search are lower than the savings which they expect to make'.<sup>9</sup> Therefore, the time and energy involved in acquiring accurate product information in respect of low cost items may deter consumers from making the effort to acquaint themselves with the relevant information, even if such information is available.

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(8) For example, an advertiser will incur additional expenditure in framing his claims with gullible consumers in mind as more time and effort will be involved, and if liability is determined by reference to such individuals, insurance against potential liability will, of necessity, command higher premiums.

(9) Duggan, 'Fairness in Advertising: In Pursuit of the Hidden Persuaders', (1977-78) 11 Melbourne University Law Review 50, 57-58.



*Three*, accurate market information is useful only to those who have the power and ability to choose, and the provision of such information can never ensure that a rational choice will be made; however the absence of such information deprives the consumer of even the possibility of rational selection.

Therefore, while bearing these limitations in mind, it is submitted that the provision of more and better information will make for a more competitive market place and discerning consumer to the collective benefit of manufacturers, sellers and consumers.

## (2) QUALITY OF INFORMATION

Here the greatest lacuna in terms of control is the absence of legislative proscription of unfair advertising. The distinction between truth and falsity is wholly inappropriate as a means of control in the arena of unfair advertising where, in particular, psychological appeals persuade a consumer to purchase an advertised commodity. The need for regulation in this area is no less pressing than in respect of claims which fall foul of current legislative standards demanding that claims be true. The consumer who is persuaded to purchase an inferior product by virtue of unfair advertising appeals is indistinguishable from his counterpart who in reliance upon a false advertising claim purchases a similar product. The result is the same; that is, there is a misallocation of

resources in economic terms as an inferior product has captured his 'dollar votes' to his detriment and to the detriment of the manufacturer of the superior product. While it is undeniably true that the measurement of what is true as opposed to false is clear in comparison to an assessment of what is 'unfair', this should not stand in the way of the control of unfair advertising and trade practices in general. The courts have long been accustomed to grappling with the issue of what constitutes an 'oppressive credit contract',<sup>10</sup> and determination of what is an 'unfair' advertisement is no more, nor less, complicated. Initial uncertainty as to the scope of what is 'unfair' could be countered by the enactment of guidelines and by directing the courts to have regard to the relevant code or codes of advertising practice in that area.<sup>11</sup>

Another area where the quality of information needs to be reassessed is in the area of "puffery". While it is not suggested that the law should lend its assistance to the unduly gullible, the advertiser's current latitude to extol the virtues of his goods or services in exaggerated and laudatory terms should, it is submitted, be curtailed. Given that goods, for example, are often encompassed in elaborate packaging and that the goods themselves often

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(10) See the Credit Contracts Act 1981, ss 9-14; *Barret v Hartley* (1866) LR 2 EQ 789; *Samuel v Newbold* [1906] AC 461; *Curlett v Clarke* (1908) 11 GLR 284.

(11) See, infra, page 519.

are highly sophisticated, the opportunity for, and ability of, a consumer to make his own evaluation is reduced considerably. In these circumstances the average consumer may take more cognisance of exhortations of the 'ours-is-the-best' variety, and to dismiss such claims as mere puffery may not be in accord with the realities of the modern market place. Furthermore, the disparity in bargaining power between trader and consumer frequently means that the consumer is in a 'take it or leave it' predicament and it is fanciful to visualise a haggling process as to price and other attributes of a product or service. Finally, this writer is concerned that widescale use of puffery diminishes the impact and usefulness of advertising generally. It is often argued that no control over puffery is required as everyone knows and recognises puffery for what it is. The question then is: Why do so many advertisers resort to puffery? Either they are wedded to old traditional sales rhetoric or they believe sales will be promoted by the use of exaggerated commendations. This writer is of the opinion that it would be a grave injustice to ascribe the former motivation to such an innovative and progressive industry as advertising, and if the latter is the objective of puffery, then some constraint is dictated. The use of exaggerated claims in advertising has the additional disadvantage of driving honest and restrained advertisers to make more exaggerated and expansive claims in order to attract custom and to avoid a loss of their market share to rivals who employ flamboyant and exaggerated

commendations in advertising. The really significant danger is that competition in advertising may become a surrogate for true competition in respect of criteria such as price and quality.

(3) QUANTITY OF INFORMATION

Much advertising is uninformative as the primary function of advertising from the seller's point of view is to promote the sale of goods or supply of services or credit. Of course, all advertisements convey some information such as the name of the product or existence of a service or credit facility and where it may be obtained; but, certain types of information will never be disclosed voluntarily by advertisers as such disclosure would run counter to the avowed objective of sales promotion. For example, confectionery manufacturers are not going to disseminate information relating to potentially harmful dental consequences attendant upon the consumption of their product and cigarette and tobacco manufacturers will not commit corporate suicide by emphasising voluntarily, or even referring to, health hazards in promotional material. The brevity of advertisements and the complexity of many advertised commodities proscribe detailed informational disclosure in advertisements but it is suggested that the quantity of information may be improved upon without significant increases in costs in the following ways. First, mandatory disclosure of the price of all

advertised goods and services. Second, where a retailer sells goods on credit terms in the ordinary course of business, any advertisement in respect of advertised goods should display the finance rate with equal prominence to the cash price. Third, the promulgation of information standards *vis-a-vis* certain goods would ensure that any advertisement or other communication in respect of such goods incorporated the designated information.<sup>12</sup>

Outside the advertising arena progress has been made in respect of informational disclosure. The Credit Contracts Act 1981 marks the most significant step forward and while the efficacy of the disclosure regime introduced by that legislation remains to be seen, the philosophy behind the Act and the desire to promote shopping for credit is, with respect, highly commendable. In specific areas such as motor vehicle dealer sales and door to door sales the legislature has sought further to advance the consumer interest through mandatory disclosure of salient particulars. Outside these areas it is suggested that mandatory disclosure of price information in advertisements and price tickets and of information laid down in product information standards will improve the purchaser's position. Furthermore, a Consumer Affairs Department<sup>13</sup> could

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(12) See, infra, page 521-522.

(13) See, infra, page 510 et seq.

fulfil a useful function in this area by publicising in the media the results of any surveys conducted by that Department or by the Consumers' Institute. The Consumers' Institute at present publish invaluable information about goods and services and comparative tests conducted in respect of competing products in *Consumer*, but this information only reaches a comparatively small section of the public.<sup>14</sup>

(4) CODES OF PRACTICE AND CONDUCT.

Self regulatory codes of practice and other codes of conduct have considerable potential to advance the consumer interest in the field of consumer information and should, therefore, be encouraged and extended. Chief drawbacks of any self regulatory scheme are incomplete membership of organisations promoting such schemes and lack of adequate sanctions for enforcement. However, the position as regards broadcasting is a salutary exception as all broadcasters must adhere to the standards and rules promulgated by the Broadcasting Rules Committee, and the Broadcasting Tribunal has an array of sanctions which it may impose to secure compliance; the ultimate sanction at

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(14) Certain information is released to the news media for early publication where unsafe products are involved due to the need to avert the delay of two months before warnings in respect of such products can be published in *Consumer*; and, other general information and test material published in *Consumer* is released to the news media to keep the name of Consumers' Institute before the public. See the Consumer Council Annual Report for the year ending 31 December 1978, at page 11.

the Tribunal's disposal is the power ~~to~~ to refuse the renewal of a broadcasting licence of a station which does not abide by these codes of practice. Of course, these codes derive their efficacy from statutory backing and hence are quite distinguishable from *voluntary* codes of conduct. The position as regards the print media is severely deficient by comparison in that (i) not all organisations and publications subscribe to the codes of practice promulgated by the Committee of Advertising Practice; (ii) the penalties for non compliance which may be visited upon supposed adherents who transgress are woefully inadequate;<sup>15</sup> and (iii) complaints in respect of advertisements in newspapers are heard by a subcommittee of the Newspaper Publishers' Association which is composed solely of newspaper interests and no complaints procedure or body exists for the adjudication of complaints in respect of mailbox advertising, in-store advertising etc.

These deficiencies may be remedied in the following ways:

*First*, by securing across-the-board membership and subscription to the codes of advertising practice. One way to achieve this objective would be through legislative intervention; for example, the legislature could pass a law

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(15) Namely, a complaint is upheld or rejected without more.

making the lawful receipt of advertising revenues contingent upon the advertiser's membership of the Committee of Advertising Practice. Non compliance with this law could entail the forfeiture of any advertising revenues or result in the imposition of a fine.

Alternatively, a less interventionist approach may be pursued, and organisations such as the Direct Mail Association and publications such as the *New Zealand Listener* could be encouraged by the Department of Consumer Affairs<sup>16</sup> to join the Committee of Advertising Practice; whether a government department would succeed where the industry itself has failed is, of course, a moot point.

*Second*, by establishing an independent complaints body. Here the alternatives are again between government intervention on a substantial basis, on the one hand, and industry response to persuasive pressures, on the other. The former approach would entail the establishment of a Print Media Tribunal along the same lines as the Broadcasting Tribunal. This organisation would be empowered to adjudicate upon, *inter alia*, all complaints in respect of advertisements appearing in the print media. Like the Broadcasting Tribunal, this body could comprise three members appointed by the Governor General on the recommendation of the Minister of Consumer Affairs. Alternatively the advertising industry could be encouraged to form an Advertising Standards Authority analogous to the organisa-

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(16) See discussion, *infra*, page 510 *et seq.*



tion developed by its British counterpart. The Advertising Standards Authority in the United Kingdom is an organisation created by the advertising industry to supervise the Code of Advertising Practice and its enforcement. Its chairperson is a person from outside the industry and a substantial number of its members must have no connection with advertising. Similarly, the Department of Consumer Affairs could press for the establishment of such an organisation in New Zealand with a mixed composition of industry and 'outside' representatives. All complaints in respect of alleged breaches of the codes of advertising practice could be referred to this body.

*Third*, by providing adequate sanctions in respect of non-compliance. If the extreme and, some would say, draconian interventionist approach is pursued extremely effective sanctions could be imposed. For example, the Print Media Tribunal could be empowered, as a measure of last resort, to expel any member who persistently or regularly violated the codes of advertising practice. Such expulsion would disentitle the offender from lawfully receiving advertising revenues until such time as he is reinstated as a member. For the isolated or minor breach the Tribunal simply could direct that the advertiser 'go and sin no more'. If the alternative persuasive approach is adopted in an endeavour to secure industry co-operation it is difficult to see what effective sanctions could be imposed - in these circumstances the Advertising Standards Authority would adjudicate upon the

validity or otherwise of the complaint, leaving the complainant to pursue the matter further in any civil action available or to refer the matter to the Department of Consumer Affairs for possible prosecution.

Which approach, then, is to be preferred? This writer favours the less stringent of the approaches outlined above for a number of reasons:

*First*, it is proposed below that more stringent legislation governing advertising be enacted; if such legislation is promulgated the necessity for rigorous control at the first tier self regulatory level is diminished considerably.

*Second*, more stringent legislation governing advertising will have a powerful deterrent effect within the industry and the incentive to comply voluntarily will be increased immeasurably.

*Third*, the approach advocating compulsory membership of the Committee of Advertising Practice and the creation of a Print Media Council with extensive powers marks a total departure from self regulation in the true sense as it constitutes another form of quasi-governmental control. While it is submitted that there is no logical reason for the current discrimination<sup>17</sup> as between the broadcast and

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(17) Namely, the broadcast media are obliged under threat of heavy sanctions to comply with codes of practice, while the print media are left largely to their own devices.

print media, this is not an argument in favour of the imposition of similar controls in the print media.

*Finally*, if industry co-operation can be obtained by the Department of Consumer Affairs this will be to the mutual advantage of advertisers and consumers alike; the consumer body will benefit through more accurate and 'fair' advertising, and the advertising industry will not be subjected to a dual tier of *in terrorem* compliance; namely, compliance under threat of Print Media Council sanctions as well as prosecution under proposed new legislation. If advertisers do not take steps to secure voluntary compliance with the codes of advertising practice it is always possible to implement the more draconian approach at a later stage.

#### (5) CONSUMER REDRESS

Consumer redress for misleading advertising and other claims in respect of goods will be greatly enhanced if the recommendations of the Contracts and Commercial Law Reform Committee in its Working Paper on Warranties in the Sale of Consumer Goods<sup>18</sup> are adopted. A new warranty of 'ordinary acceptability' would be implied by statute into all contracts for 'consumer sales'. The Committee recommends

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(18) See recommendation 14, at page 13 of this Working Paper . (Wellington 1977).

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"Goods should be acceptable in accordance with the new Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect *having regard to any statement, description or promise applied to them*, their age, the presence of defects of which, at the time of sale, the buyer had actual knowledge, and all other relevant circumstances including the price at which they were sold."

The Committee also recommends that the absence of consideration or privity of contract<sup>19</sup> between manufacturer and consumer should not prevent a claim by a consumer against a manufacturer for breach of implied warranty.<sup>20</sup> Therefore, the necessity for a consumer to find a collateral contract or to establish the existence of a fraudulent or negligent misrepresentation by the manufacturer in advertising or other promotional material would disappear.

Furthermore, it is proposed below that new legislation governing advertising should confer a right of civil action on any consumer in respect of any breach of the statutory duties outlined in that legislation. This would promote consumer redress and, even more importantly, make for effective policing of misleading and unfair advertising practices by extending the category of potential complainants; in effect, use will be made of private interests

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(19) See also the Contracts (Privity) Bill 1981, clause 4.

(20) See recommendation 19, pages 21-22 of the Working Paper.

to promote the public good.<sup>21</sup>

As regards facilitating redress it is recommended that (i) the jurisdiction of small claims tribunals be extended to encompass all tortious claims and that the tribunals monetary restriction in respect of orders be increased to \$2,000; and (ii) that damages be recoverable as an appropriate remedy in a representative action.

#### (6) GOVERNMENT REGULATION

##### (a) A Consumer Affairs Department

At the outset it is recommended that a Consumer Affairs Department be created with responsibility, *inter alia*, for overseeing consumer information in the market place. Such a department is essential, in this writer's opinion, for the following reasons:

*First*, there is a need for co-ordination in the consumer protection field in general. As Ann Hercus, Member of Parliament for Lyttelton, asserted recently:

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(21) See Grimes, 'Control of Advertising in the United States and Germany: Volkswagen has a better idea', (1971) 84 Harvard Law Review 1769, where the benefit of a broad category of potential complainants in respect of any deceptive claim or dishonest business practice are extolled.

"Ask the Department of Trade and Industry about a food complaint, and you will be sent to the Department of Health. Ask the Department of Justice about a possible rip-off in pricing, and they'll say 'go to the Department of Trade and Industry'. Ask the Department of Trade and Industry about the Sale of Goods Act - they'll say that's administered by the Department of Justice. It's a bit of a shambles, for consumers, sorting out which Government Department has which responsibility for which legislation." 22

Consequently, it is suggested that the case for a Consumer Affairs Department charged with the administration of all major consumer-oriented legislation rests in part on the co-ordination that this would bring to bear; that is, rather than have consumer legislation scattered around many unconnected departments its administration could be 'under one roof'.<sup>23</sup> Consumer enquiries and complaints will focus on a Consumer Affairs Department as the name of the Department itself would suggest itself as the appropriate starting point. The Consumer Affairs Department could then investigate and endeavour to resolve the complaint, or refer the consumer to the appropriate person or organisation so as to facilitate resolution of the dispute.

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(22) Speech on 'Consumer Policy', delivered at St George's Hall, Christchurch, 28 October 1981.

(23) Idem.

*Second*, a Consumer Affairs Department would have specific responsibility for consumer protection and would not regard the fulfilment of this duty as being ancillary to other major functions. For example, the Department of Trade and Industry is charged with an enormous diversity of responsibilities and it is naive to assume that this Department has the time and resources to devote to the discharge of all of these responsibilities in a comprehensive manner. At the present time the Department of Trade and Industry has been forced to hire additional staff just to cope with complaints and enquiries relating to the price freeze;<sup>24</sup> furthermore, as mentioned earlier, the Examiner of Commercial Practices does not regard his function as involving a policing of the market place and exclusive reliance is placed on consumers bringing complaints *vis-a-vis* advertising to the attention of the Examiner or the Department of Trade and Industry.<sup>25</sup> A Consumer Affairs Department would have as its focus the interests of consumers and, given adequate resources, would be in a position to maintain a surveillance of market practices.

*Third*, a Consumer Affairs Department could be charged with a number of specific duties; namely:

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(24) See the Price Freeze Regulations 1982.

(25) Correspondence with the Office of the Examiner of Commercial Practices, 12 July 1982.

- (i) The administration of a new Consumer Information Act.<sup>26</sup>
- (ii) The promotion of codes of practice and membership of organisations promulgating such codes.
- (iii) The approval of particular codes if satisfied that the code safeguards and promotes the interests of consumers and that the trade association etc. intends to make it a success.<sup>27</sup>
- (iv) The promulgation of information standards in respect of certain goods and services. For example, the Governor General may, by Order in Council made on the advice of the Minister of Consumer Affairs, be empowered to make regulations designed to secure the disclosure of particular information in advertisements and elsewhere in respect of specified goods and services.
- (v) The publication of results of surveys, tests and other information about competing goods, services and credit sources, and of information relating to the existence and contents of various codes of practice, consumer rights, etc.
- (vi) The advancement of consumer education through publicity campaigns, the dissemination of information and teaching materials to schools and through the promotion of

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(26) See infra, page 518 et seq.

(27) See the Fair Trading Act 1973 (UK), s 124(4).



clear standard form contracts. In New York, a recently enacted statute requires consumer contracts to be written 'in a clear and cogent manner using words with common and everyday meanings',<sup>28</sup> but as Mr Justice Kirby, Chairman of the Australian Law Reform Commission, remarks, it remains to be seen 'whether such a pious command in a statute book will have any great effect...'.<sup>29</sup> The Consumer Affairs Department, however, could negotiate with trade organisations, such as the Retailers Federation, to ensure that contracts are clearly worded and that they incorporate a section advising consumers of their rights and obligations.

(vii) The support of organisations such as the Consumers' Institute, Citizens Advice Bureaux and other community consumer organisations.

These specific functions could only be properly discharged by a government department with a specific brief in this regard - to allocate such functions to a number of existing government departments would destroy any prospect of cohesive action and create the risk of these duties being submerged in the morass of other responsibilities.

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(28) New York General Obligations Law 1978, para. 5-701 B.

(29) 'Ending Legal Gobbledygook', *Advocatus* 1981, 3, at page 5; see also I.L. McKay, 'Intelligible Drafting', Paper for the New Zealand Law Society's Conference, Dunedin, April 1981.

*Fourth*, a Minister of Consumer Affairs and his ministry can promote new legislation from the 'inside', examine any pertinent cabinet papers and examine the effects of any proposal from any other Government Department on consumer matters.<sup>30</sup>

*Finally*, it is noted that the establishment of such a department would, by no means, be a revolutionary step. All Australian states have such a ministry and the Labour Party in New Zealand advocate the establishment of a Ministry of Consumer Protection.<sup>31</sup> Given the number of government departments, the absence of a department charged with the specific responsibility of looking after consumers reflects poorly on government priorities. Naturally there will be costs involved in the establishment of an additional government department but the benefits that may accrue have the potential to outweigh this negative feature, and many staff for a new Consumer Affairs Department could be drawn from existing departments whose responsibilities are reduced.

The arguments advanced in favour of the establishment of a Consumer Affairs Department are in no way intended as an indirect attack on the Consumer Council and Consumers' Institute. While the Consumer Council and Institute are *empowered* to fulfil some of the functions that this writer would foresee a Consumer Affairs Department as being

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(30) Speech by Ann Hercus, M.P., supra.

(31) Labour Party Consumer Policy 1981.

*obligated* to perform,<sup>32</sup> there would not necessarily be a conflict of interest. The Consumer Council and Consumers' Institute are, first and foremost, not in a position to administer consumer protection legislation - this, of necessity, must be the function of a government department. Second, the Consumers' Institute enjoys a unique reputation for impartiality and the role of consumer advocate with interventionist powers would diminish this admirable reputation.<sup>33</sup> Third, the consumer needs a voice in Cabinet and a Minister of Consumer Affairs can promote the consumer interest from the 'inside' - the Consumer Council and Consumers' Institute obviously are 'outsiders' in this regard. Finally, far from derogating from the immensely valuable work done by these statutory bodies, a Consumer Affairs Department could support these bodies financially and otherwise. Therefore, the Consumer Affairs Department, Consumer Council and Consumers' Institute are envisaged as being complementary, rather than as alternatives.

Finally, mention must be made of the possibility of establishing a Consumer Ombudsman's Office. In Sweden,

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(32) For example, the Consumer Council is empowered to encourage educational work in the interests of consumers of goods and services and to collect and disseminate information relating to consumer matters. See the Consumer Council Act 1966, s 17(2)(b), (d).

(33) One of the major grounds for the prohibition against the use of findings of the Consumers' Institute is a desire to protect the Institute's reputation for impartiality. See *Consumer* 87, 211.

the Consumer Ombudsman is given extensive powers to police marketing practices<sup>34</sup> and is also charged with the responsibility of monitoring standard form contracts.<sup>35</sup> This person is empowered to bring actions before a Market Court<sup>36</sup> in respect of alleged market malpractices and employment of 'improper contract terms'. Like the Examiner of Commercial Practices in New Zealand,<sup>37</sup> the Ombudsman must endeavour to secure compliance through negotiation and only if satisfactory agreement is not reached does the Ombudsman initiate any action; however, he has not exhibited any reluctance to initiate actions and, in any event, consumer groups and others are given *locus standi* to apply to the Market Court to bring an action where the Ombudsman fails to act.<sup>38</sup> The Market Court is empowered to give injunctive relief and may refer cases to the Public Prosecutor for criminal prosecution in appropriate cases. There is little doubt that the Consumer Ombudsman in Sweden has done much to advance the consumer

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(34) Pursuant to the Marketing Practices Act 1970.

(35) See the Act Prohibiting Improper Contract Terms 1971.

(36) King, Consumer Protection Experiments in Sweden (1974), 15, observes that this court is 'primarily for considering problems relating to the consumer' and has as its primary function the resolution of cases brought by the Consumer Ombudsman.

(37) Pursuant to the Consumer Information Act 1969, s 19.

(38) King, op. cit., 9 remarks that 'this tends to serve as a check on any Consumer Ombudsman who might not sufficiently press consumer interests'.

interest but it is submitted that the establishment of similar position in New Zealand is unnecessary given the existence of the Consumers' Institute, the Office of the Examiner of Commercial Practices and the proposed establishment of a Consumer Affairs Department. Nevertheless, the device of a Consumer Ombudsman merits some attention if only as a benchmark whereby the functioning of the proposed scheme may be assessed. In this writer's view, however, the creation of a Consumer Ombudsman could never be an effective substitute for a Consumer Affairs Department in that he would not be able to exercise the "insider" advantages of a Minister of Consumer Affairs, and he could not "administer" or co-ordinate all consumer protection legislation.

(b) A New Consumer Information Act

Having outlined the suggested administrative machinery for the promotion of consumer information and surveillance of market practices, it is recommended that a new Consumer Information Act be passed to effect the following objectives:

(i) Prohibition of misleading and unfair advertisements.

It is recommended that the relevant provision be drafted in the following, or like, manner.

*"(1) No person shall, for the purpose of effecting or promoting the sale or supply of any product or service, publish or cause to be published, either on that person's own account or as the agent or employee of the person seeking to effect or promote the sale, any advertisement relating to a product or service that -*

(a) *Is likely to deceive or mislead a reasonable person with regard to any material particular; or*

(b) *Is unfair.*

(2) *For purposes of subsection (1)(b) of this section, in deciding whether an advertisement is unfair the Court shall have regard to such of the following matters as are applicable (if any):*

(a) *Whether the codes of advertising practice or standards of conduct existing in respect of the media in which the advertisement appeared proscribe such advertisements;*

(b) *Whether the advertisement is immoral, unethical, oppressive or unscrupulous;*

(c) *Whether the advertisement offends public policy;*

(d) *Whether it is likely to cause substantial injury to a significant number of consumers; and*

(e) *Such other matters as the Court thinks fit.*"<sup>39</sup>

As regards misleading advertising, such a provision would, it is submitted, strike a balance between consumers, on the one hand, and advertisers, on the other. In determining whether an advertisement is misleading or deceptive it would not be necessary to point to actual deception as a deceptive or misleading capacity would be sufficient. However, the potential stringency of this approach would be mitigated by the requirement that this capacity to deceive or mislead must be more than a bare possibility<sup>40</sup>

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(39) See the Medicines Act 1981, s 57; the Food Act 1981, s 11; the Credit Contracts Act 1981, s 35; *FTC v Sperry & Hutchinson Co* 405 US 233, 244 (1972), Trade Practices Act 1974 (Australia), s 52(1).

(40) See *Transport Ministry v Simmonds* [1973] 1 NZLR 359, 363.

and must relate to a material particular. Furthermore, in determining this capacity or tendency to mislead or deceive the focal point of the inquiry is a reasonable person; it would not be enough if the advertisement had the capacity to mislead an extremely impressionable or gullible consumer.<sup>41</sup>

As regards unfair advertising it is suggested that the adoption of guidelines would alleviate uncertainty surrounding the scope of an 'unfairness doctrine' and successive decisions by the courts will further erode areas of uncertainty.<sup>42</sup>

(ii) Informational disclosure in advertisements.

It is submitted that a provision to the following effect should be incorporated in the proposed legislation; namely:

"2.(1) *Every advertisement in respect of any product or service shall state the cash price in respect of the product or service.*

(2) *If any person represents in an advertisement that he has goods available for sale below the normal or usual price he shall, if the reduced price per unit of goods is more than \$30, state in the advertisement the number of units available for sale to the public at the reduced price.* 43

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(41) Compare the approach in the United States as reflected in cases such as *Florence Manufacturing v J.C. Dowd Co* 178 F 73, 75 (1910); *Charles of Ritz Distributors Corp v FTC* 143 F 2d 676 (1944).

(42) See Burrows, 'Contract Statutes and Judicial Discretion', (1981) 1 *Canterbury Law Review* 253, 254.

(43) See the Consumer Information Act 1969, s 10(4).

(3) Every advertisement published by, or on behalf of, a retailer or supplier, in respect of goods or services which are available on deferred payment terms, shall state the finance rate in respect of the deferred payment dispositions of those goods or services.

(4) Every advertisement shall state such other particulars as may be required by regulations made pursuant to this Act." 44

As regards the proposed provision 2(3), an alternative approach could be adopted; namely:

*"No advertisement advertising deferred payment dispositions of goods or services shall state the weekly or monthly instalments payable in respect of the goods or services unless it also states with equal prominence, and describes as such, the finance rate in respect of the deferred payment dispositions of those goods or services."* 45

However, this alternative approach may have the undesirable effect of reducing the amount of information disclosed in advertisements; at present retailers frequently disclose weekly and monthly instalments payable in respect of deferred payment dispositions and the enactment of this alternative provision may tip the balance against such disclosure because such disclosure would have to be accompanied by disclosure of the finance rate. This alternative approach gives the retailer an option to disclose, whereas the provision as embodied in the

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(44) See the Consumer Information Act 1969, s 10; the Credit Contracts Act 1981, s 37; the Medicines Act 1981, s 57(1)(a-e); the Food Act 1981, s 11(1)(a-e).

(45) Cf. Credit Contracts Act 1981, s 37.



proposed section above requires disclosure in all cases.

It is proposed that regulations could be promulgated making it necessary for additional information to be disclosed in respect of advertisements for certain specified goods and services; that is, informational standards could be developed by the Consumer Affairs Department requiring the disclosure of additional factors such as durability, the length and nature of any guarantees and performance characteristics.

(iii) Prohibition of bait advertising.

Here it is recommended that this practice should be curtailed in the following manner.

*"3. (1) A person that has, in trade or commerce, advertised goods or services for supply at a reduced price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which that person carries on business and the nature of the advertisement. 46*

*(2) Subsection (1) shall not apply if the advertisement states the quantity of goods available for sale at the reduced price and there is in fact that quantity available for sale to the public." 47*

(iv) Prohibition of false or misleading labelling and packaging.

In this regard it is submitted that the provisions in the Consumer Information Act 1969<sup>48</sup> should be retained.

(46) See the Trade Practices Act 1974 (Australia), s 56; cf. the Consumer Information Act 1969, s 10(3).

(47) See the Consumer Information Act 1969, s 10(3).

(48) See sections 5, 6, 7, 8.

However, there is scope for a more succinct statement of the law in this area and regard could be had of the corresponding provisions in the Food Act 1981<sup>49</sup> and Medicines Act 1981<sup>50</sup> which cover much the same ground in a commendably concise fashion.

(v) Adequate enforcement of the legislation.

Here a number of submissions are made.

*First*, that the approach adopted in the Food Act 1981<sup>51</sup> and Medicines Act 1981<sup>52</sup> as regards strict liability be implemented in this legislation. In any prosecution in respect of a breach of any provision it should not be necessary for the prosecution to prove that the defendant intended to commit the offence. However, it should also be provided that it would be a good defence in any such prosecution if the defendant proves: (a) That he did not intend to commit an offence against this legislation or any regulations made pursuant to the legislation; and (b) That he took all reasonable steps to ensure that there was compliance with the legislation and any relevant regulations.<sup>53</sup> This, it is submitted, represents the ideal compromise; the prosecution is not saddled with the

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(49) S 10.

(50) S 61.

(51) S 30.

(52) S 80.

(53) See the Food Act 1981, s 30; the Medicines Act 1981, s 80; the Credit Contracts Act 1981, s 38.

difficult task of proving *mens rea* and the advertiser is given an escape route provided he can point to adequate screening and other controls over advertisements. It is recognised that the proposed provisions outlined earlier would impose responsibility on a number of persons; for example, the seller, the advertising agent and, say, the newspaper publisher of the advertisement. It is submitted that this approach may be justified on a number of grounds:

- (a) This would not represent a departure from pre-existing practice as many of the statutes relating to advertising which provide penal sanctions apply to publishers<sup>54</sup> and do not confine their attention to the "author" of the communication.
- (b) The consumer pays for the advertising in the long run and, therefore, is entitled to an honest and informative service and the greater the net of potential liability the more widespread will screening procedures be.
- (c) It is a settled rule of the law of defamation that the fact that a defendant correctly reported the statements of another affords him no defence in an

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(54) See, for example, the Consumer Information Act 1969, ss 9(4), 21; Food and Drugs Act 1969, ss 8-10.

action for defamation - the wrong resides in the publication.<sup>55</sup> Why should a different position be taken in respect of the publication of false, misleading and unfair advertising?<sup>56</sup>

- (d) Finally, a person may, in terms of the legislation outlined above, escape liability by negating the existence of a guilty mind and by demonstrating that he took all *reasonable* steps to ensure that there was compliance. The content of this duty to take care will vary according to the circumstances<sup>57</sup> and it is submitted that regard will be had to the relevant expertise and experience of the seller, advertising agent or bureau, or publisher, respectively, in assessing whether all reasonable steps have been taken. The publisher whose incidental function involves the publication of advertisements cannot be expected to take the same precautions as an advertising agency whose main business is the production of advertisements, for example, and the concept of "reasonableness" is flexible enough to take into account this, and other, factors.

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(55) See Burrows, News Media Law in New Zealand (2 ed, 1980), 36.

(56) See Securities Commission, Proposed Recommendations for Securities Regulations (1980), para. 12.4.5.(f).

(57) Cf. the position with the tort of negligence. See *British Railways Board v Herrington* [1972] AC 877; *Goldman v Hargrave* [1967] 1 AC 645, 663.

For these reasons it is submitted that the net of potential liability should be cast widely.

*Second*, every person who commits an offence against this legislation should be liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$5000, and if the offence is a continuing one, to a further fine not exceeding \$200 for every day or part of a day during which the offence has continued.<sup>58</sup>

*Third*, the court should be empowered to order corrective advertising to eliminate residual consumer deceptions and continuing competitive injury. In deciding whether to make such an order the court should be directed to have regard to such of the following matters as are applicable; namely: (a) The residual impact of the advertisement or advertising campaign;<sup>59</sup> (b) The nature of the deceptive or misleading claim;<sup>60</sup> (c) The size and characteristics of the audience; (d) The sales volume and market position

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(58) See the Credit Contracts Act 1981, s 38; the Food Act 1981, s 28; the Medicines Act 1981, s 78; the Consumer Information Act 1969, s 18(2).

(59) Thain, 'Corrective Advertising: Theory and Cases', (1973) 19 New York Law Forum 1, 24 observes that advertisements are most likely to have residual impact in situations

".. in which television rather than print media is used, the advertising campaign is long running and often repeated rather than a one-shot affair, there is significant brand loyalty in the relevant market, and the termination of the deceptive advertisement was fairly recent and thus more likely to influence purchasers."

(60) For example, with certain nutritional, efficacy and safety claims consumers have no prospect of determining the accuracy or otherwise of a claim.

of the advertiser; (e) The blatancy of the deception; (f) The potential danger to the health and safety of the consumer; and (g) Such other matters as the court thinks fit.<sup>61</sup>

*Fourth*, the Minister of Consumer Affairs, or his delegates in the Department of Consumer Affairs, should be empowered to require advertisers to submit all tests, studies or other data purporting to substantiate claims, statements or representations made regarding the performance, efficacy or any other matter of the product or service to the Department of Consumer Affairs. Such a power would have two major benefits; that is, (a) the investigation of complaints and alleged abuses would be facilitated, and (b) advertisers would be more cautious in framing their advertising claims etc by ensuring that such claims are firmly founded.

*Finally*, the legislation should authorise consumers to bring a civil action in respect of any breach of the duties imposed by the legislation. A broad category of potential complainants in respect of any advertising, packaging or labelling that is calculated to mislead or deceive a reasonable consumer makes for more effective policing of such undesirable practices and effective use is made of private interests to promote the public good, and at no expense to the taxpayer.

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(61) See Thain, *op. cit.*; Cornfeld, 'A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission', (1976) 61 Iowa Law Review 693.

It is submitted that legislation embodying the provisions as outlined above would promote honest and informative advertising and other disclosure to the benefit of consumers and businesses. By enhancing the quality and quantity of information that a consumer receives this may ensure that a consumer is better able to choose between competing goods and services and distortions occasioned by deceptive or misleading claims may be eliminated, thereby fostering workable competition and combatting resource misallocation.

Finally, as a matter of public policy, some consideration should be given to prohibiting the dissemination of certain product and service information, and to restricting the level of expenditure associated with the promotion of products and services. It is well recognised that the cost of advertising is born by the consumer as the costs of advertising are reflected as a component in the product price and certain types of advertising, such as liquor advertising and cigarette advertising, is open to serious and justifiable criticism. As the Minister of Justice, Mr McLay, recently observed<sup>62</sup>

"Many people are rightly concerned about the effects that the misuse of liquor can have, not only on the individual who drinks but also on his or her family and the community in general."

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(62) See "The Press", 26 July 1982.

The New Zealand Government has already intervened in respect of cigarette advertising and by agreement there is no advertising in respect of cigarettes and tobacco products on television or on the radio.<sup>63</sup>

Liquor advertising and television advertising aimed at young children are other areas that may merit governmental attention.<sup>64</sup> Furthermore, the costs to the consumer of advertising and other promotional activities may be reduced by imposing a limit or ceiling on such expenditure in those industries where advertising excesses are most prevalent. The rationale of this approach is that it would 'stop the escalation of advertising expenditures and eliminate some of the self-cancelling wastage, so that firms would compete through advertising only up to a point, returning thereafter to price and quality competition'.<sup>65</sup> Alternatively, as the Prime Minister, Mr R.D. Muldoon, recently suggested, a tax could be imposed on advertising expenditures.<sup>66</sup> This

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(63) *New Zealand Official Yearbook* (1979), 340.

(64) See, for example, Note, 'Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children', (1979) 54 *New York University Law Review* 561; Barnes and Blakeney, 'The Regulation of Children's Television Advertising - The Australian Experience', (1980) 3 *Journal of Media Law and Practice*, 265.

(65) Duggan, 'The Great Soap Opera', (1978) 11 *Melbourne University Law Review* 467, 494.

(66) See "The Press", 29 May 1982. The Prime Minister suggested that 'advertising was crying out to be taxed'.



might be achieved directly through the taxation of advertising expenditure above a specified level, or indirectly by not permitting advertising expenditure as a deductible expense for income tax purposes. These issues of public policy lie outside the scope of this writer's enquiry, but are very important matters for the legislature to consider in proposing and formulating any regime of control in the field of consumer information.

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